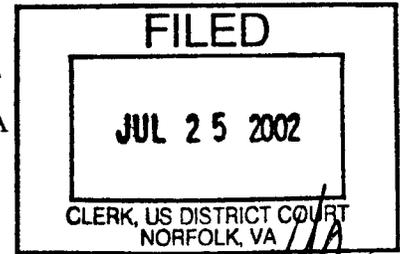


IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION



YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next  
Friend of Yaser Esam Hamdi,

Petitioners,

v.

Civil Action No. 2:02cv439

DONALD RUMSFELD,  
Secretary of Defense,

COMMANDER W.R. PAULETTE,  
Norfolk Naval Brig,

Respondents.

**RESPONDENTS' RESPONSE TO, AND MOTION TO DISMISS,  
THE PETITION FOR A WRIT OF HABEAS CORPUS**

Respondents Donald Rumsfeld, Secretary of Defense, and Commander W.R. Paulette, Norfolk Naval Brig, by and through undersigned counsel, oppose and hereby move to dismiss the petition for a writ of habeas corpus in this case.

**STATEMENT OF THE CASE**

1. Background. On September 11, 2001, the al Qaida terrorist organization launched a large-scale, coordinated attack on the United States, killing approximately 3,000 persons, and specifically targeting the Headquarters of the Nation's Department of Defense. The President, pursuant to his constitutional authority as Commander in Chief, took immediate steps to prevent future attacks. Congress then authorized the President to use force against the "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) (attached as Exh. B to Petition for a Writ of Habeas Corpus (Pet.)). Congress further emphasized that the forces responsible for the September 11 attack pose an “unusual and extraordinary threat to the national security and foreign policy of the United States,” and that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” Ibid.

The President, acting pursuant to his Commander in Chief authority and with express congressional support, dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaida terrorist network and the Taliban regime that had supported and protected that network. The ongoing military operations in Afghanistan – which are being conducted not only by thousands of men and women of the United States armed forces, but also by coalition forces of our international allies and members of the Northern Alliance and other local forces – have resulted, inter alia, in the destruction of al Qaida training camps, removal of the Taliban regime that supported al Qaida, and gathering of vital intelligence concerning the plans, operations, and workings of al Qaida and its supporters. Numerous members of the military forces sent to Afghanistan have lost their lives, and many others have suffered casualties as part of the campaign launched in the wake of September 11. See generally [www.army.mil/enduringfreedom](http://www.army.mil/enduringfreedom).

In the course of the military campaign – which remains active and ongoing – United States and allied forces have captured or taken control of numerous individuals. Consistent with the settled laws and customs of war, and with the practice followed in virtually every other major armed conflict in the nation’s history, the United States military has determined that many of the individuals captured in Afghanistan should be detained as enemy combatants. See Declaration of Michael H. Mobbs (Mobbs Decl.) (attached hereto). Such detention serves the vital objective of

preventing combatants from continuing to aid our enemies. In addition, detention of such combatants is critical to gathering intelligence in connection with the overall war effort, and especially with aiding military operations and preventing additional attacks on the United States or its allies.

The detainee in this case, Yaser Esam Hamdi, appears to be a Saudi national who, records indicate, was born in Louisiana. He was seized as an enemy combatant and taken into control of the United States military in Afghanistan, after the Taliban unit that he was with surrendered to Northern Alliance forces in late 2001. See Mobbs Decl. ¶¶ 3-4. Applying screening criteria established by the United States military to determine which detainees seized in Afghanistan should continue to be detained, United States military authorities determined that Hamdi should be detained as an enemy combatant. *Id.* ¶ 6; see *id.* at ¶ 2, 7.<sup>1</sup> In Afghanistan, Hamdi told United States military authorities that he went to Afghanistan to train with and, if necessary, fight for the Taliban. *Id.* ¶ 5. Subsequent interviews with Hamdi also confirm his status as an enemy combatant. Indeed, Hamdi himself has stated that he laid down his assault rifle upon surrendering to Northern Alliance forces. *Id.* ¶ 9. Hamdi was transported by the United States military from Afghanistan to the Naval Base at Guantanamo Bay, Cuba, and was later transferred to the Naval Brig in Norfolk, Virginia. *Id.* ¶ 8.

2. This Habeas Action. On June 11, 2002, the detainee's father, Esam Fouad Hamdi, filed

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<sup>1</sup> The screening criteria themselves are classified. Respondents can provide the Court further information about the criteria in a classified filing that would be submitted *ex parte* and under seal. However, review of the screening criteria is not necessary to the resolution of the petition in this case, which, for reasons explained below, fails as a matter of law.

this habeas action “on behalf of his son \* \* \* as his Next Friend.” Pet. ¶ 1.<sup>2</sup> The petition alleges, inter alia, that the detainee, Hamdi, was residing in Afghanistan when he was taken into control of the United States military, and that Hamdi has been detained by the military since the fall of 2001 without being “charged with an offense” or “provided counsel.” Id. ¶¶ 9, 19; see id. ¶ 12. The petition presents two challenges to the “[l]awfulness of [Hamdi]’s detention.” Id. at 6 (heading). First, the petition states that, “[a]s an American citizen, [Hamdi] enjoys the full protections of the Constitution,” and that Hamdi’s detention “violate[s] the Fifth and Fourteenth Amendments to the United States Constitution.” Id. ¶¶ 22, 23. Second, the petition states that, “[t]o the extent that [the President’s Order of November 13, 2001] disallows any challenge to the legality of [Hamdi]’s detention by way of habeas corpus, the Order and its enforcement constitute an unlawful suspension of the Writ, in violation of Article I of the United States Constitution.” Id. ¶ 25. The petition seeks Hamdi’s release from custody and certain other relief. See id. at 7.

Before respondents had been served with the petition or had any notice of it, this Court ordered the petition filed, and ordered the appointment of the federal public defender as “counsel for the Petitioner.” June 11, 2002 Order at 2-3. The Court further ordered respondents to allow the public defender to meet with the detainee in “private \* \* \* without military personnel present.” Id. at 3. Respondents appealed the June 11 Order and requested a stay pending appeal. On June 14, 2002, the court of appeals stayed the June 11 Order and “all proceedings before the district court in connection with this detainee until resolution of th[e] appeal.” Order, Hamdi v. Rumsfeld, No.

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<sup>2</sup> Two previous habeas petitions were filed on behalf of Hamdi. Following an appeal of the May 29, 2002 Order entered by this Court in those cases, see Hamdi v. Rumsfeld, 2002 WL 1369635 (4th Cir. June 26, 2002), those petitions were ordered dismissed by this Court.

02-6895. The court of appeals specified that “[a]ll stays shall remain in effect pending further order of the Court.” Ibid. On July 12, 2002, the court of appeals issued an opinion reversing and remanding this Court’s June 11 Order, “[b]ecause the district court appointed counsel and ordered access to the detainee without adequately considering the implications of its actions and allowing the United States even to respond.” Hamdi v. Rumsfeld, 2002 WL 1483908, at 1.

On July 18, 2002, before issuance of the court of appeals’ mandate in that appeal and before any order of the Fourth Circuit lifting the stay of “all proceedings” before this Court involving Hamdi, the Court ordered respondents, inter alia, to respond to the petition by noon on July 25, 2002. In addition, the Court ordered respondents to supply with their response answers to three issues not raised by the petition itself: (1) whether the detainee is being held “incommunicado” and, if he is not, “why \* \* \* he can have visitors but not one of them be a lawyer,” Tr. of July 18, 2002 Hrg. at 5; (2) whether the detainee is being held in “solitary confinement” and, if so, “would due process apply to him” on the basis of being so held, id. at 6; and (3) “with whom is [the United States] fighting,” and “how would [the war] ever end if there is no government or organization with one can deal,” ibid. This motion to dismiss is filed in response to the Court’s July 18 Order.<sup>3</sup>

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<sup>3</sup> Because the court of appeals’ mandate has not yet issued, the court of appeals’ stay of “all proceedings before the district court in connection with this detainee” remains in effect. See 4th Cir. Rule 8 (“An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court.”). Accordingly, respondents continue to object to the effort of this Court to exercise jurisdiction over this action before issuance of the mandate. See United States v. Montgomery, 262 F.3d 233, 239 (4th Cir.), cert. denied, 122 S. Ct. 526 (2001); see also Kusay v. United States, 62 F.3d 192 (7th Cir. 1995).

## ARGUMENT

### THE PETITION SHOULD BE DISMISSED BECAUSE THE DETAINEE IS LAWFULLY DETAINED AS AN ENEMY COMBATANT

As the Fourth Circuit emphasized just weeks ago in this very case, this habeas action “arises in the context of foreign relations and national security, where a court’s deference to the political branches of our national government is considerable.” Hamdi v. Rumsfeld, 2002 WL 1483908, at \*3; accord Thomasson v. Perry, 80 F.3d 915, 924-926 (4th Cir.), cert. denied, 519 U.S. 948 (1996); Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991). The petition challenges the authority of the Commander in Chief and the military to detain an enemy combatant captured in the theater of battle in a foreign land in connection with an ongoing military campaign. As the court of appeals held, the capture and detention of enemy combatants falls within the President’s core war powers and, with respect to the present conflict, comes with the statutory authorization of Congress. See Hamdi, 2002 WL 1483908, at \*3; id. at 5. Moreover, the court observed that “[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants,” and directed that “[a]ny judicial inquiry into [an individual]’s status as an alleged enemy combatant \* \* \* must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack.” Id. at \*5. Applying those “cardinal principles” (id. at \*3) here compels the conclusion that the petition’s challenge to the “[l]awfulness of [Hamdi’s] detention” (Pet. at 6 (heading)) fails as a matter of law and, therefore, the petition should be dismissed by this Court without any further inquiry.

#### **A. It Is Settled That The Military’s Detention Of Enemy Combatants In Connection With Ongoing Hostilities, Including The Current Conflict, Is “Lawful”**

The first claim raised by the petition in this case is that Hamdi is being detained in violation

of the Constitution's due process guarantee. Pet. ¶¶ 21-23. That claim fails as a matter of law. The United States's authority to hold enemy combatants, including those with a claim to United States citizenship, is well-established and, indeed, in the wake of the recent appeal, is established law of the case in this action. Nothing in the Due Process Clause precludes such a detention. As the court of appeals has just held, "[i]t 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." Hamdi, 2002 WL 1483908, at \*5 (emphasis added).

1. In so holding, the court of appeals drew upon a settled body of law recognizing that the United States military may seize and detain enemy combatants, or other belligerents, for the duration of a conflict. See Hamdi, 2002 WL 1483908, at \*5. For example, in Ex parte Quirin, 317 U.S. 1, 30-31 (1942) (emphasis added and footnotes omitted), the Supreme Court stated:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

See id. at 31 n.8 (citing authorities); Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); In re Territo, 156 F.2d 142, 145 (9th Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913).<sup>4</sup>

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<sup>4</sup> The practice of capturing and detaining enemy combatants is as old as war itself. See A. Rosas, The Legal Status of Prisoners of War 44-45 (1976). "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released." Territo, 156 F.2d at 146 (footnotes omitted). The capture and detention of enemy combatants also serves other vital military objectives, including the critical and age-old objective of obtaining intelligence from captured combatants to aid in the war effort. At the same time, once individuals are taken into control as enemy combatants, they are protected from harm or other reprisals, given medical care, and are treated humanely.

As the court of appeals recognized in this case, it also is settled that the military's authority to detain an enemy combatant is not diminished by a claim, or even a showing, of American citizenship. See Hamdi, 2002 WL 1483908, at \*5 (parenthetical discussing Quirin, 317 U.S. at 31, 37); see also Quirin, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful"); Territo, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not \* \* \* confer upon him any constitutional rights not accorded any other belligerent under the laws of war."), cert. denied 352 U.S. 1014 (1957). To be sure, the fact that such a combatant has American citizenship may enable him to proceed with a habeas action that could not be brought by an alien combatant (cf. Johnson v. Eisentrager, 339 U.S. 763 (1950)), but it does not affect the Executive's settled authority to detain him as an enemy combatant. /

The United States military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. As the court of appeals has recognized, "[t]he unconventional aspects of the present struggle do not make its stakes any less grave," and they do not, as the court further held, diminish the military's settled authority to capture and detain enemy combatants in connection with that conflict. Hamdi, 2002 WL 1483908, at \*5.<sup>5</sup>

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<sup>5</sup> As Quirin makes clear, the military's authority to capture and detain enemy combatants exists regardless of whether they are "lawful" or "unlawful" combatants under the laws and customs of war. Quirin, 317 U.S. at 30-31; see p. \_\_, supra (quoting Quirin). In any event, the President has determined that al Qaida and the Taliban are unlawful combatants. See United

2. As an enemy combatant, the military's "present detention" of Hamdi is "lawful," Hamdi, 2002 WL 1483908, at \*5, even though he has not been "charged with an offense" or "provided counsel." Pet. ¶ 19. There is no obligation under the laws and customs of war for captors to charge combatants with an offense (whether under the law of war or domestic law); indeed, a significant number, if not the vast majority, of those seized in war are never charged with any offense but instead are simply detained during the conflict. Similarly, there is no general right under the laws and customs of war for those detained as enemy combatants to be provided counsel. Even under the Third Geneva Convention – which does not afford protections to unlawful enemy combatants, such as the detainee here, see note 5, supra – prisoners of war have no right of access to counsel to challenge their detention. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 (GPW), Article 105.<sup>6</sup>

The Constitution does not supply any different guarantee. The Sixth Amendment by its terms applies only in the case of "criminal prosecutions," U.S. Const. amend. VI, and therefore does not apply to the detention of any enemy combatant who – like most such combatants – has not been charged with any crime. Cf. Middendorf v. Henry, 425 U.S. 25, 38 (1976) ("[A] proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a

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States v. Lindh, \_\_\_ F.Supp.2d \_\_\_, 2002 WL 1489373, at \*8-\*11 (E.D. Va. July 11, 2002). As noted above, Hamdi was captured as part of a Taliban unit. Mobbs Decl. ¶ 4.

<sup>6</sup> Article 105 of the GPW provides that a prisoner of war should be provided with counsel to defend against charges brought against him in a trial proceeding at least two weeks before the opening of such trial. But the availability of that general trial right only underscores that prisoners of war who do not face such charges are not entitled to counsel, or access to counsel, simply to challenge the fact of their wartime detention.

traditional civilian criminal trial.”). Similarly, the Self-Incrimination Clause of the Fifth Amendment is a “trial right of criminal defendants,” and therefore also does not extend to this situation. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added). The only possible remaining source of a right to charges or counsel is the Due Process Clause.

Any suggestion of a generalized due process right under the Fifth Amendment could not be squared with, *inter alia*, the historical unavailability of any right to prompt charges or counsel for those held as enemy combatants. Cf. Herrera v. Collins, 506 U.S. 390, 407-408 (1993); Medina v. California, 505 U.S. 437, 445-446 (1992); Moyer v. Peabody, 212 U.S. 78, 84 (1909); see also Colepaugh, 235 F.2d at 432; Ex parte Toscano, 208 F. at 943. As the Supreme Court stated in Quirin, 317 U.S. at 27-28, “[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.” Moreover, if the Court were to consider the creation of some entirely new right under the Fifth Amendment in this case, the Court would have to balance the creation of such a right against the government’s own interests, including the President’s plenary authority as Commander in Chief and the important national security interests implicated by allowing access to counsel to enemy combatants. See, *e.g.*, Middendorf, 425 U.S. at 42-43; *id.* at 45-46; *id.* at 49-51 (Powell, J., joined by Blackmun, J., concurring). Accordingly, even the most general due process analysis would not support a claim that Hamdi’s “present detention” is unlawful because he has not been charged or provided counsel.<sup>7</sup>

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<sup>7</sup> In addition, the Supreme Court has rejected the argument that due process entitles state prisoners to counsel in seeking post-conviction relief, even in capital cases. See Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion); see also United States v. Gouveia, 467 U.S. 180 (1984) (no right to counsel during period of

3. Similarly, nothing in 18 U.S.C. 4001 precludes Hamdi's detention as an enemy combatant. That provision – entitled "Limitation on detention; control of prisons" – states:

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates, and provide for their rehabilitation, and reformation.

18 U.S.C. 4001. Although the petition does not mention Section 4001(a), petitioners raised it before the court of appeals and relied on it at oral argument before the Fourth Circuit. The court of appeals specifically inquired about Section 4001(a)'s application to this case, see Tr. of June 25, 2002 Arg. at 18-19, and yet reached the proper conclusion that Hamdi's "present detention" is "lawful" as long as he is properly classified as an enemy combatant. Hamdi, 2000 WL 1483908, at \*5.

First, nothing in Section 4001 suggests that Congress sought to intrude upon the "long \* \* \* established" authority of the Executive to capture and detain enemy combatants in war time. Hamdi, 2000 WL 1483908, at \*5; see id. at \*3 ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2."). To the contrary, Section 4001 by its terms is addressed to the control of civilian prisons and related detentions. Indeed, subsection (b) explicitly addresses the "control and management of Federal penal and correctional institutions," and exempts from its coverage "military or naval institutions." 18 U.S.C. 4001(b).

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administrative detention).

Subsection (a), the provision cited by petitioners in the court of appeals, cannot be read without reference to the immediately surrounding text. See Owasso Indep. Sch. Dist. v. Falvo, 122 S. Ct. 934, 939-940 (2002) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); accord Tyler v. Cain, 533 U.S. 656, 662-663 (2001); Jones v. United States, 527 U.S. 373, 388 (1999). And, particularly when the provision is read as a whole, there is no basis for concluding that Section 4001 was in any way addressed to the military’s detention of enemy combatants.

Second, even if Section 4001 were susceptible to a different interpretation, this Court’s duty would be to adopt the facially reasonable – if not textually compelled – interpretation that Section 4001 is addressed to civilian rather than military detentions. As the Supreme Court has held, “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” Jones v. United States, 529 U.S. 848, 857 (2000); accord Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988). The longstanding canon of constitutional avoidance independently forecloses any interpretation of Section 4001(a) that would extend it to interfere with the longstanding authority of the President as Commander in Chief and the armed forces to detain enemy combatants during war time. Petitioners’ proposed reading of Section 4001(a) would directly interfere with the President’s ability to detain an enemy combatant who claims citizenship. That situation arose in World War II, see Quirin, supra; Territo, supra, and has now arisen again. A Court should not infer that a provision that is explicitly addressed to civilian detentions meant to override that long-established and vital war time authority of the Executive.

Third, and in any event, the detention at issue is authorized by at least two different Acts of Congress. First, as the court of appeals specifically noted (Hamdi, 2000 WL 1483908, at \*3, \*5), the challenged Executive actions in this case fall within Congress's express statutory authorization to the President "to use force against those 'nations, organizations, or persons he determines' were responsible for the September 11 terrorist attacks." Hamdi, 2002 WL 1483908, at \*5 (quoting 115 Stat. 224; emphasis added by court of appeals). Second, Congress has appropriated funding to the Department of Defense to pay for the expenses incurred in connection with "the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war." 10 U.S.C. 956(5); see 10 U.S.C. 956(4) (appropriating funding for the "issue of authorized articles to prisoners and other persons in military custody"). By explicitly funding the detention of "prisoners of war" and persons – such as enemy combatants – "similar to prisoners of war" Congress has plainly authorized the military detention of such combatants. Therefore, Section 4001(a) does not in any way bar the military detention of enemy combatants such as Hamdi.

In sum, as long as Hamdi "is indeed an 'enemy combatant,'" then – as the Fourth Circuit already has established in this case – his "present detention" is "lawful." Hamdi, 2000 WL 1483908, at \*5. Because the petition itself does not challenge the military's determination that Hamdi is an enemy combatant, but instead raises legal challenges that were considered and rejected, inter alia, by the Supreme Court in Quirin, petitioners' due process claims fails on its own terms. In any event, as explained in Part C, infra, even if the petition had challenged Hamdi's enemy combatant status (or if petitioners attempt to do so now), the military has properly determined that Hamdi is an enemy combatant and, as a matter of law, that determination satisfies any appropriate standard of review.

**B. The President's Order Of November 13, 2001 Is Not Applicable To Hamdi And Has Not Resulted In Any Suspension Of The Writ**

In addition to the alleged violation of due process, the only other claim raised by the petition is the legal claim that, to the extent that the President's Military Order of November 13, 2001 (see Pet., Exh. C) forecloses judicial review of Hamdi's detention via habeas, "the Order and its enforcement constitute an unlawful suspension of the Writ." Pet. ¶ 25. That claim, too, fails as a matter of law. By its terms, the President's November 13, 2001 Order applies only to non-citizens whom the President determines "in writing" to be subject to his Order. See Military Order § 2(a). The President has made no such written determination with respect to Hamdi, who is alleged to be an American citizen. Therefore, the President's Military Order has absolutely no application to Hamdi in his present situation. That is a sufficient basis to reject the petition's second claim as a matter of law. But in any event, the very fact of this habeas proceeding underscores that there has been no "Suspension of the Writ." Pet. ¶ 25. The writ of habeas corpus remains available to individuals, such as Hamdi, who are detained as enemy combatants to challenge the legality of their detention. Petitioners' challenges to Hamdi's detention as inconsistent with the Due Process Clause and 18 U.S.C. 4001(a) fail for the reasons explained above, but they involve a classic use of the writ to challenge the legality of detention, just as, for example, the Quirin petitioners employed the writ to raise similar – and similarly unavailing – claims.

**C. As A Matter Of Law, The Military Has Properly Determined That Hamdi**

## Should Be Detained As An Enemy Combatant

Although the petition does not specifically challenge the military's determination that Hamdi is an enemy combatant, it is clear that such determination is proper and, as a matter of law, is entitled to be given effect by the courts under any appropriate standard of review.

1. The Fourth Circuit already has made clear in this case that the tremendous deference owed to the political branches in matters involving foreign relations and national security "extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Hamdi, 2002 WL 1483908 at \*3 (emphasis added). The court further emphasized that "the standard for reviewing the government's designation of Hamdi as an enemy combatant" is shaped by "[s]eparation of powers principles," and "must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, from additional unprovoked attack." Id. at \*5.

Indeed, the Executive's determination that someone is an enemy combatant and should be detained as such is one of the most fundamental military judgments of all. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.") (Douglas, J., concurring); cf. Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (determinations with respect to how to treat enemy aliens "when the guns are silent but the peace of Peace has not come \* \* \* are matters of political judgment for which judges have neither technical competence nor official responsibility"); Eisentrager, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the

Commander-in-Chief in sending our armed forces abroad or to any particular region.”). And the Judiciary, as the Fourth Circuit has recognized, lacks institutional competence in making such military judgments. See Hamdi, 2002 WL 1483908 at \*5 (“The executive is best prepared to exercise the military judgment attending the capture of alleged combatants.”); see also Thomasson, 80 F.3d at 926 (“[T]he lack of competence on the part of the courts [with respect to military judgments] is marked) (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)); Tiffany, 931 F.2d at 278.

2. The sworn declaration appended hereto explaining the military’s determination that Hamdi is an enemy combatant readily satisfies any constitutionally appropriate standard of judicial review in this extremely sensitive and important realm of Executive decisionmaking. Proper respect for separation of powers and the appropriate division of responsibilities between the judicial and executive branches may well limit the courts to the consideration of legal attacks on detention of the type considered in Quirin and Territo (and raised by petitioners here and discussed in Parts A and B, supra). At most, however, in light of fundamental separations of powers concerns, a court’s proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military’s determination that the detainee is an enemy combatant. This return and the accompanying declaration more than satisfy that standard of review.

Indeed, in evaluating habeas challenges to analogous – but much less constitutionally sensitive – executive determinations, courts have refused to permit use of the writ to challenge the factual accuracy of such determinations, and instead call upon the Executive only to show “some evidence” supporting its determination. See, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (deportation order: “Until the enactment of the 1952 Immigration and Nationality Act, the sole

means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.”) (citations omitted); Eagles v. United States, 329 U.S. 304, 312 (1946) (selective service determination: “If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.”) (citations omitted); United States v. Commissioner, 273 U.S. 103, 106 (1927) (deportation order: “Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced.”); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (extradition order: “[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.”). The focus of the inquiry is thus the Executive’s determination, and the court’s role is limited to confirming that there was a basis for that determination, and not to undertake a de novo determination for itself.

Moyer v. Peabody, 212 U.S. 78 (1909), is also instructive in this connection. There, the Court considered the due process challenge of a person who had been detained without probable cause for months by the governor of Colorado acting in his capacity of “commander in chief of the state forces” during a local “state of insurrection.” Id. at 82. In rejecting that challenge, Justice Holmes, writing for a unanimous Court, explained: “So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had

not reasonable ground for his belief.” *Id.* at 85; see also United States v. Salerno, 481 U.S. 739, 748 (1987) (“[I]n times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the government believes to be dangerous.”) (citing Moyer); United States v. Chalk, 441 F.2d 1277, 1282 (4th Cir.) (“It is enough, we think, that there was a factual basis for the mayor’s decision to proclaim the existence of a state of emergency and that he acted in good faith.”) (citing Moyer), cert. denied, 404 U.S. 943 (1971).<sup>8</sup>

The basic considerations underlying the limited scope of judicial review of the sorts of executive determinations underlying the foregoing cases are only magnified in a case such as this, involving a challenge to the military’s determination that someone seized in the middle of active hostilities in a foreign land is an enemy combatant. And so too, at a bare minimum, the military’s determination that an individual is an enemy combatant should be respected by the courts as long as the military shows some evidence for that determination. Any more demanding standard would

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<sup>8</sup> Judicial deference to executive branch determinations is hardly unique. For example, in suits brought under the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.*, to challenge executive agency actions, the standard of judicial review is “a narrow, highly deferential one,” see, e.g., Bagdonas v. Department of Treasury, 93 F.3d 422, 425 (7th Cir. 1996) (citing 5 U.S.C. S 706(2)(A)), bordering on a presumption that the action taken is valid, see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), overruled on other grounds, 430 U.S. 99, 97 S. Ct. 980 (1977); accord Comsat Corp. v. National Science Foundation, 190 F.3d 269, 278 (4th Cir. 1999) (in APA cases, courts “defer to the agency’s judgment, recognizing \* \* \* that federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do \* \* \* [because] [o]ur Constitution vests such responsibilities in the political branches.”) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984)). The APA standard of review does not permit a reviewing court to “substitute [its] judgment for that of the agency.” See, e.g., Heartwood, 230 F.3d 947, 953 (7th Cir. 2000) Instead, the court must affirm the action if the agency’s “decision was supported by a ‘rational basis.’” Bagdonas, 93 F.3d at 425-26. Although the standard of review appropriate with respect to the type of military determination at issue in this case is far more deferential than anything under the APA, the APA example underscores the typically hands-off approach of the Judiciary when it comes to reviewing executive decisionmaking.

disregard the compelling separations of powers concerns recognized by the court of appeals in this case and unnecessarily invite the “special hazards of judicial involvement in military decision-making” foreseen by the court of appeals. As the Fourth Circuit recognized, “allowing alleged combatants to call American commanders to account in federal courtrooms would stand the war-making powers of Article I and II on their heads.” Hamdi, 2000 WL 1483908, at \*6. At the same time, applying a heightened standard would risk “a conflict between judicial and military opinion highly comforting to enemies of the United States.” Eisentrager, 339 U.S. at 779.

Respondents here have provided a more than ample factual basis to support the military’s determination that the detainee in this case is an enemy combatant. The Mobbs Declaration explains the relevant events surrounding Hamdi’s capture and detention. In particular, the declaration explains that Hamdi went to Afghanistan to train with and, if necessary, fight for the Taliban; he remained with the Taliban after September 11, 2001, and after the United States military campaign began in Afghanistan in October 2001; and he was captured when his Taliban unit surrendered to – and, indeed, laid down arms to – Northern Alliances forces. Mobbs Decl. ¶¶ 3-5, 9.<sup>9</sup> The declaration further explains that the military determined that Hamdi should be detained as an enemy combatant based on interrogations with Hamdi in which Hamdi himself stated that he went to Afghanistan to train with the Taliban and that he turned over his assault rifle to Northern Alliance

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<sup>9</sup> The fact that Hamdi was undisputably seized in the midst of hostile territory occupied by al Qaida and Taliban is itself significant. See Pet. ¶ 9 (“Hamdi resided in Afghanistan” when he was seized.); cf. Miller v. United States, 78 U.S. 268, 310-311 (1870) (In the context of determining rights to confiscated property, Court stated “[i]t is ever a presumption that inhabitants of an enemy’s territory are enemies, even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside.”); Lamar, Executor v. Browne, 92 U.S. 187, 194 (1875) (“In war, all residents of enemy country are enemies.”).

forces. Id. ¶¶ 5, 9. The Mobbs Declaration amply supports the military's determination that Hamdi is an enemy combatant and, therefore, that Hamdi is being lawfully detained as such.

3. No further factual development or evidentiary proceedings are necessary to dispose of the petition. Under the deferential inquiry discussed above, a court's role is limited to evaluating whether the Executive has shown some factual basis for its decision. A court is not to review, or to second-guess, the particular facts relied upon the Executive in making its decision. In particular, in the context in which this case arises, there is no basis for a court to conduct evidentiary proceedings with respect to any of the particular facts or circumstances surrounding an individual's capture as an enemy combatant, effectively opening the door for "alleged enemy combatants to call American commanders to account in federal court rooms." Hamdi, 2000 WL 1483908, at \*5. The Court's proper role does not permit it to call members of the United States military back from the front, or to somehow attempt to bring into the courtroom the Northern Alliance forces who accepted Hamdi's surrender. Nor would it be proper to call Hamdi himself to court and, thus, seriously jeopardize important national security interests related to intelligence gathering. There is no need for an attempt at recreation or de novo examination of the circumstances surrounding Hamdi's capture on a foreign battlefield. The relevant issue is whether the United States military had a factual basis for treating Hamdi as an enemy combatant. This return and the accompanying declaration readily demonstrate that the military had such a basis, and that is the end of the inquiry.

Similarly, because the exclusive focus is on whether the military had a factual basis for its determination, there is no need for an attorney to have access to a detained enemy combatant to see if the detainee disputes any of the facts relied upon by the military. That conclusion is bolstered further by the urgent national interests that would be jeopardized by allowing attorneys to have

access to detained enemy combatants. First, such access would directly interfere with – and likely thwart – efforts of the United States military to gather and evaluate intelligence about the enemy, its assets, and its plans, and its supporters. Such intelligence is critical to the successful prosecution of any war effort and, in the present conflict, in all likelihood already has avoided additional harm to American lives or interests on the home front. Second, such access may enable detained enemy combatants to pass concealed messages to the enemy about military detention facilities, the security at such facilities, or other military operations – something that members (and presumably supporters) of al Qaida are trained to do. See Al Qaida Manual, [www.usdoj.gov:80/ag/trainingmanual.htm](http://www.usdoj.gov:80/ag/trainingmanual.htm).

Collecting and assessing intelligence is one of the most important duties of the Commander in Chief, especially in wartime. See United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir.) (“[g]athering intelligence information” is “within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces”), cert. denied, 409 U.S. 1063 (1972); see also Snepp v. United States, 444 U.S. 507, 512 n.7 (1980) (per curiam) (“It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence.”). Especially when there is no need whatever for such access to dispose as a matter of law of a habeas petition such as this, a court should refuse to overstep the fundamental separation of powers principles discussed above and jeopardize vital national security interests in intelligence gathering.

#### **D. Response To This Court’s Own Queries Of July 18, 2002**

On July 18, 2002, this Court ordered respondents to include in their response to the petition answers to three questions listed below that are not raised in the petition. See Tr. of July 18, 2002 Hrg. at 5-7; see id. at 7 (The answers to the Court’s questions “will be provided in the answer that

the government is to file to the petition.”). That sua sponte request for information relevant to theories not raised by the petition is difficult to square with the restraint typically exercised by the courts in reviewing challenges, such as this case, arising “in the context of foreign relations and national security.” Hamdi, 2000 WL 1483908, at \*3; see id. at \*6 (“Our Constitution’s commitment of the conduct of war to the political branches of American government requires the court’s respect at every step.”). In addition, this Court’s own queries cannot alter the claims presented by the petition giving rise to this case. In any event, as explained below, the answers to the Court’s inquiries further confirm that Hamdi is being lawfully detained as an enemy combatant.

1. The Court inquired “why \* \* \* if [Hamdi] is possibly an American citizen, he can have visitors but not one of them be a lawyer.” Tr. of July 18, 2002 Hrg. at 5. That query was addressed to press reports indicating “that all of the United States citizens who were being held or those people who may have had United States citizenship were not held incommunicado, according to press reports, and were having visitors.” Ibid. A recent article in The Virginia Pilot reported on a panel discussion at a state bar association meeting. See C. Kahn, Federal Prosecutors Defend Handling of Terrorism Suspects, The Virginia Pilot (July 14, 2002). The comments to which the Court presumably referred appeared to have been directed to individuals held pursuant to criminal charges, material witness warrants, or immigration violations, and not those held as enemy combatants.<sup>10</sup>

Individuals who are detained by the military as enemy combatants, including Hamdi, are allowed only official contacts – i.e., government and military officials and representatives from the

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<sup>10</sup> Although Mr. McNulty, United States Attorney for the Eastern District of Virginia, spoke at the state bar association meeting reported by the article, the comments to which the Court appears to have been referring were made by another Department of Justice official, as the article indicates.

International Committee of the Red Cross. No other visitors are allowed. As discussed above, the military has generally determined that allowing other visitors – including lawyers – to have access to detained enemy combatants would jeopardize national security interests by interfering with ongoing intelligence gathering efforts and possibly allowing detainees to pass concealed messages about, inter alia, the security in the facilities where they have been detained. See p. 20, supra. Detained enemy combatants are permitted to send and receive mail to and from family members. Due to national and institutional security concerns, all mail is screened.

2. The Court inquired whether, if Hamdi is being held in “solitary confinement,” “would due process apply to him.” Tr. of July 18, 2002 Hrg. at 6. As discussed above, the Fourth Circuit has held that Hamdi’s “present detention” is “lawful” as long as he is an enemy combatant. Hamdi, 2000 WL 1483908, at \*5. Presently, Hamdi is not being held in solitary confinement, as that term is normally understood. He is, however, the only enemy combatant detained in the Norfolk Naval Brig and, pursuant to 10 U.S.C. 812, is not confined in “immediate association” with members of the United States armed forces. There is no factual dispute about this, but any legal challenge to the conditions of Hamdi’s confinement would fail as a matter of law. The military’s decision to separate Hamdi from any others at the Norfolk Naval Brig does not trigger any additional layer of due process review. Determinations about the appropriate conditions of confinement for an individual properly held as an enemy combatant are committed to the military. Even if Hamdi were subject to the same due process protections applicable to typical prison inmates, however, no due process violation would result from separating him from the main prison population (or in limiting his visitation) when, as here, the reasons for those restrictions are related to obviously legitimate security and

prison management concerns.<sup>11</sup> A fortiori, those types of conditions would not raise any different, or meritorious, due process claim with respect to the type of sensitive military detention at issue here.

3. Finally, the Court inquired about the unconventional aspects of the present conflict. See Tr. of July 18, 2002 Hrg. at 7 (“[W]ith whom is [the United States] fighting,” and “how would [the war] ever end if there is no government or organization with one can deal.”). The fighting in Afghanistan has focused on al Qaeda and the Taliban, but, as Congress’s Joint Resolution Authorizing the Use of Military Force underscores, the current conflict at a minimum involves the “nations, organizations, or persons he [i.e., the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” 115 Stat. 224. With respect to when the conflict will end, the key point is that there is no dispute that the United States is presently engaged in active hostilities. As a result, even if cessation of hostilities and the continued need to detain enemy combatants were matters for judicial inquiry, the concern that hostilities might persist indefinitely is clearly premature here.

More generally, the Supreme Court has expressly recognized that questions concerning the

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<sup>11</sup> Even in the civilian prison context, courts have afforded prison officials broad latitude to restrict visitation rights of both convicted inmates and pretrial detainees. See Block v. Rutherford, 468 U.S. 576, 585-589 (1984); Pell v. Procunier, 417 U.S. 817, 822-828 (1974). Even for pretrial detainees, who have not been convicted of any crime, prison officials are afforded great deference to impose restrictions, as long as they are reasonably related to a legitimate security concern. Bell v. Wolfish, 441 U.S. 520, 536-540 (1979). The same is true for segregation from other prisoners, as long as the segregation is not for punitive reasons, but merely for administrative or security concerns, as is true here. Higgs v. Carver, 286 F.3d 437, 438 (7th Cir. 2002) (pretrial detainees have no due process right to avoid administrative segregation), citing Bell v. Wolfish, 441 U.S. 520 (1979); Sandin v. Conner, 515 U.S. 472, 485 (1995) (30-day disciplinary segregation of convicted prisoner not subject to due process where it was not a “dramatic departure from the basic conditions of [the prisoner’s] \* \* \* sentence”).

cessation of hostilities or the scope of armed conflict are committed to the political branches. See, e.g., Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (Whether a state of “war” exists is a “matter[] of political judgment for which judges have neither technical competence nor official responsibility.”); United States v. The Three Friends, 166 U.S. 1, 63 (1887) (“[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted.”); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) (“Whether the President \* \* \* has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department”). The unconventional nature of the war in which the Nation is currently engaged only heightens the need for judicial deference to the determination of the political branches with respect to such judgments.

In any event, as the Fourth Circuit has recognized – and as the savage attack of September 11 underscores – “[t]he unconventional aspects of the present struggle do not make its stakes any less grave.” Hamdi, 2000 WL 1483908, at \*5. Nor, as the Fourth Circuit’s recent decision also makes clear, does the unconventional nature of the conflict in any way diminish the military’s “established” authority lawfully to detain Hamdi as an enemy combatant. See ibid.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of habeas corpus should be dismissed.

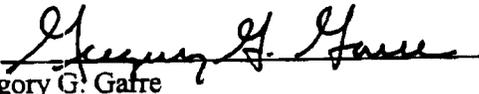
Respectfully submitted,

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Dated: July 25, 2002

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Respondents' Response to and Motion to Dismiss the Petition for Writ of Habeas Corpus was served, this 25<sup>th</sup> day of July, 2002, by hand delivery addressed to:

Larry W. Shelton  
Supervisory Assistant Federal Public Defender  
Jeremy C. Kamens  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
150 Boush Street, Suite 403  
Norfolk, Virginia 23510

A handwritten signature in black ink, appearing to read "Lawrence R. Leonard", written over a horizontal line.

Lawrence R. Leonard  
Managing Assistant United States Attorney

**Declaration of Michael H. Mobbs**  
**Special Advisor to the Under Secretary of Defense for Policy**

Pursuant to 28 U.S.C. § 1746, I, Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

1. I am a Special Advisor to the Under Secretary of Defense for Policy. In this position, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban). I have been involved with detainee operations since mid-February 2002 and currently head the Under Secretary of Defense for Policy's Detainee Policy Group.
2. I am familiar with Department of Defense, U.S. Central Command and U.S. land forces commander policies and procedures applicable to the detention, control and transfer of al Qaeda or Taliban personnel in Afghanistan during the relevant period. Based upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of Yaser Esam Hamdi and his detention by U.S. military forces.
3. Yaser Esam 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.
4. 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. After a prison uprising, the Northern Alliance transferred Hamdi to a prison at Sheberghan, Afghanistan, which was also under the control of Northern Alliance forces.
5. While in the Northern Alliance prison at Sheberghan, Hamdi was interviewed by a U.S. interrogation team. He 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. Hamdi spoke English.



6. Al Qaeda and Taliban were and are hostile forces engaged in armed conflict with the armed forces of the United States and its Coalition partners. Accordingly, individuals associated with al Qaeda or Taliban were and continue to be enemy combatants. Based upon his interviews and in light of his association with the Taliban, Hamdi was considered by military forces to be an enemy combatant.
7. At the Sheberghan prison, Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants over whom the United States was taking control. Based on an order of the U.S. land forces commander, a group of detainees, including Hamdi, was transferred from the Northern Alliance-controlled Sheberghan prison to the U.S. short-term detention facility in Kandahar. Hamdi was in-processed and screened by U.S. forces at the Kandahar facility.
8. In January 2002, a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay.
9. A subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant.



MICHAEL H. MOBBS  
Special Advisor to the  
Under Secretary of Defense for Policy

Dated: 24 July 2002