No. 04-1342

In the Supreme Court of the United States

JOSE PADILLA, PETITIONER

v.

C.T. HANFT, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant certiorari before judgment to determine whether the President has authority to detain petitioner as an enemy combatant.

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OPINION BELOW

The opinion of the district court (Pet. App. 1a-29a) is not yet published in the *Federal Supplement*, but is available at 2005 WL 465691.

JURISDICTION

The judgment of the district court was entered on March 4, 2005. The notice of appeal was filed on March 11, 2005 (Pet. App. 30a). The petition for a writ of certiorari before judgment was filed on April 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

The President ordered the Secretary of Defense to detain petitioner militarily, as an enemy combatant, based on information that petitioner closely associated with al Qaeda, engaged in hostile and war-like acts, and presented

a grave continuing danger to the national security of the United States. The legality of petitioner's detention is currently before the United States Court of Appeals for the Fourth Circuit, which granted the parties' joint motion to expedite the government's appeal from an order of the district court (subsequently stayed by that court) directing petitioner's release. Petitioner nonetheless seeks to short-circuit that process of orderly review by asking this Court to grant certiorari before judgment in a case in which petitioner prevailed in the district court. Because that extraordinary request is without merit, the petition should be denied.

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any previously sustained by the Nation on any one day in its history. That morning, agents of the al Qaeda terrorist network hijacked four commercial airliners and crashed three of them into targets in the Nation's financial center and seat of government. The fourth crashed in rural Pennsylvania due to the heroic efforts of the passengers. The attacks killed approximately 3000 persons, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

Congress and the President took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "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 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), Pub. L.

No. 107-40, § 2(a), 115 Stat. 224. The AUMF recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and emphasized that it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." *Id.*, Pmbl.

Soon after the AUMF's enactment, the President expressly confirmed that the September 11 attacks "created a state of armed conflict" with al Qaeda. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 1(a). He ordered the armed forces of the United States to subdue the al Qaeda network, as well as the Taliban regime in Afghanistan that supported it. In the course of those armed conflicts, the United States military, consistent with the Nation's settled practice in times of war, has seized and detained numerous persons who were fighting for and associated with the enemy.

2. Petitioner is one such person detained as an enemy combatant. In 2000, petitioner attended the al Qaeda-affiliated al-Farouq training camp just north of Kandahar, Afghanistan. Rapp Decl. (Exh. B to Answer) para. 8. After successfully completing that training, petitioner spent three months just north of Kabul, Afghanistan, guarding what petitioner understood to be a Taliban outpost while armed with a Kalashnikov assault rifle. *Ibid.*

In 2001, Mohammed Atef, a senior al Qaeda operative, asked petitioner to undertake a mission to blow up apartment buildings in the United States. Rapp Decl. para. 11. Petitioner agreed to the mission and received further training from an al Qaeda explosives expert. *Ibid.*

When the United States commenced combat operations against the Taliban and al Qaeda, petitioner and other al

Qaeda operatives moved from safehouse to safehouse in Afghanistan to avoid bombing or capture, and later began moving towards Afghanistan's mountainous border with Pakistan in order to evade United States forces and air strikes. Rapp Decl. para. 10. Armed with an assault rifle, petitioner took cover with other operatives in a network of caves and bunkers near Khowst, Afghanistan, and was eventually escorted into Pakistan by Taliban personnel. *Ibid*.

Soon after entering Pakistan, petitioner met with senior Osama bin Laden lieutenant Abu Zubaydah to discuss the possibility of conducting terrorist operations in the United States. Rapp Decl. para. 10. Zubaydah sent petitioner to Karachi, Pakistan, to meet with Khalid Sheikh Mohammad (KSM), al Qaeda's operations leader. *Id*. para. 12. KSM suggested that petitioner revive the plan to detonate apartment buildings, as petitioner had initially discussed with Atef. *Ibid*. Petitioner accepted the assignment, and KSM gave him full authority to conduct the operation. *Ibid.* Before departing for the United States, petitioner received training from Ramzi Bin al-Shibh, a senior al Qaeda operative, on the secure use of telephones and e-mail protocols. *Ibid*. Al Qaeda operatives also gave petitioner $15,000, travel documents, a cell phone, and an e-mail address to notify al Qaeda facilitator Ammar al-Baluchi upon arrival in the United States. *Ibid*.

On May 8, 2002, petitioner flew from Zurich, Switzerland, to Chicago's O'Hare International Airport, where he was detained and arrested in the customs inspection area pursuant to a material witness warrant. Petitioner had been monitored by FBI agents in the Zunich airport and on the plane. Stipulations of Fact paras. 3, 6, 10. Petitioner was carrying $10,526 in currency, the cell phone that he had

been given, and the e-mail address that he was to use to update al-Baluchi. Rapp Decl. para. 13.

On June 9, 2002, the President—as Commander in Chief and pursuant to the AUMF—made a formal determination that petitioner "is, and at the time he entered the United States in May 2002 was, an enemy combatant." President's Order para. 1 (Exh. A to Answer). The President found, in particular, that petitioner: is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," *id.* para. 2; has "engaged in * * * hostile and war-like acts, including conduct in preparation for acts of international terrorism" against the United States, *id.* para. 3; "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States," *id.* para. 4; and "represents a continuing, present and grave danger to the national security of the United States," such that his detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens," *id.* para. 5.

Consistent with those findings, the President directed the Secretary of Defense "to receive [petitioner] from the Department of Justice and to detain him as an enemy combatant." President's Order. Immediately upon issuance of that directive, the Department of Justice moved to vacate the material witness warrant. That motion was granted, and petitioner was transferred to military control and taken to the Consolidated Naval Brig in Charleston, South Carolina, where he has since been detained.

3. On June 11, 2002, petitioner's counsel filed on his behalf a habeas corpus petition in the Southern District of New York. Pet. App. 6a. The district court held that it had jurisdiction and that the President had legal authority to detain petitioner as an enemy combatant. *Padilla ex rel.*

Newman v. *Bush*, 233 F. Supp. 2d 564 (S.D.N.Y.), aff'd in part, rev'd in part and remanded, 352 F.3d 695 (2d Cir. 2003), rev'd, 124 S. Ct. 2711 (2004).

The United States Court of Appeals for the Second Circuit agreed that the Southern District of New York had jurisdiction. *Padilla* v. *Rumsfeld*, 352 F.3d 695, 702-710 (2d Cir. 2003), rev'd, 124 S. Ct. 2711 (2004). On the merits, however, the court held over a dissent that the President lacks authority to detain petitioner as an enemy combatant. See *id*. at 710-724 (majority opinion); *id*. at 726-733 (Wesley, J., concurring in part and dissenting in part).

This Court granted certiorari, and held that the Southern District of New York lacked jurisdiction and the habeas petition should have been filed in the District of South Carolina. *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711, 2717-2727 (2004). This Court therefore declined to reach the question whether the President has authority to detain petitioner as an enemy combatant. *Id*. at 2715.

4. a. On July 2, 2004, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. Petitioner alleged, among other things, that his military detention violates: (i) the Constitution, because American citizens arrested in the United States may be detained only pursuant to the criminal process; and (ii) 18 U.S.C. 4001(a)—which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"—because the AUMF does not authorize his detention.

The government filed an answer detailing the legal and factual bases for petitioner's detention as an enemy combatant. Attached to that answer was the August 27, 2004, Declaration of Jeffrey N. Rapp, the Director of the Joint Intelligence Task Force for Combating Terrorism.

The Rapp Declaration includes information and intelligence that were not available during the earlier litigation in the Second Circuit and this Court. Among other things, the Rapp Declaration makes clear that petitioner not only came to the United States to commit terrorist attacks, but also had associated with al Qaeda and the Taliban, and evaded capture by United States armed forces, on the battlefields of Afghanistan—facts that had not been available during the previous litigation. See Rapp Decl. paras. 8-12; pp. 3-4, *supra*.

On October 20, 2004, petitioner filed a motion for summary judgment arguing that he is "entitled to judgment as a matter of law even if all of the facts pleaded [in the Rapp Declaration] are assumed to be true." Pet. Mem. in Supp. of Mot. for Summ. J. 1. Accordingly, the parties have not yet undertaken any discovery. Instead, they have assumed, for purposes of petitioner's motion, that all of the facts set forth in the Rapp declaration are true. See *id.* at 1, 2 n.1; Gov't Opp. to Mot. for Summ. J. 3 n.1; 9/14/04 Tr. 37-38; *id.* at 23-24, 27-36.

b. On February 28, 2005, the district court granted the summary judgment motion and habeas petition and ordered that petitioner be released from custody or charged with a crime. Pet. App. 29a & n.14. The court concluded that, notwithstanding this Court's decision in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004), the AUMF does not provide a sufficiently clear authorization for petitioner's detention. It held that Congress must speak in clear and unmistakable terms when it authorizes the President to detain enemy combatants, *id.* at 16a-18a, 21a, and that the AUMF does not clearly authorize petitioner's detention because it authorizes the use of only "necessary and appropriate" force. *Id.* at 21a-22a. In the district court's view, military detention is not necessary and appropriate

because petitioner is a United States citizen who was not captured on a battlefield, but instead was captured in a civilian setting in the United States. *Id.* at 15a, 21a-22a. The court further concluded that the President lacks inherent authority as Commander in Chief to detain petitioner as an enemy combatant. *Id.* at 24a-25a.

5. The government timely filed a notice of appeal on March 11, 2005, Pet. App. 30a, and on the same day filed a motion for a stay of the district court's order pending appeal. The district court granted the stay on April 6, 2005. On April 25, 2005, the Fourth Circuit granted the parties' joint motion to expedite consideration of the appeal. Under the court's expedited schedule, the government filed its opening brief on May 6, 2005, and briefing will be completed by June 21, 2005. Although the Fourth Circuit had not planned to hear any oral arguments between May and September 2005, it scheduled a special hearing for the argument in this case on July 19, 2005.

ARGUMENT

Petitioner seeks (Pet. 6-18) the extraordinary remedy of certiorari before judgment despite having prevailed in the district court. This Court's Rules make clear that such an extraordinary petition will not be granted unless it meets the stringent criteria for this Court's immediate intervention. See Sup. Ct. R. 11 (such petition "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"). Those criteria are not satisfied here. The court of appeals granted the parties' joint motion for expedited review, and will hear argument and may well render a decision before this Court returns from its summer recess; any review by this Court will be

aided by the court of appeals' consideration of the issues involved; and that consideration may foreclose any need for this Court's intervention. Accordingly, the petition for a writ of certiorari before judgment should be denied.

1. Petitioner's arguments in favor of certiorari before judgment all depend on the assumption that bypassing the court of appeals would materially expedite the resolution of his claims. Now that the court of appeals has granted the parties' joint motion for expedition, however, that assumption does not appear to be correct. The government has already filed its opening brief in the court of appeals, and that court has demonstrated its commitment to expedition by scheduling a special sitting in order to hear oral argument on July 19, 2005—approximately two months before the Fourth Circuit was scheduled to resume hearing arguments after a break in its schedule over the summer, and approximately two-and-a-half months before this Court is expected to resume hearing arguments after its summer recess. In the related *Hamdi* litigation, the Fourth Circuit similarly demonstrated a strong commitment to expedition by deciding each appeal in a matter of weeks. See *Hamdi* v. *Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (decided approximately ten weeks after argument), vacated, 124 S. Ct. 2633 (2004); *Hamdi* v. *Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (decided less than three weeks after argument); *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002) (decided approximately three weeks after argument).

As a result, the court of appeals may well issue its decision before this Court returns from its summer recess, or shortly thereafter. Even if the Fourth Circuit were to proceed on a more deliberate schedule, this Court should still have plenty of time to consider this case during the 2005 Term if the decision is adverse to petitioner and he decides to forego en banc review. For example, this Court

was able to hear and decide this very case before the end of the October 2003 Term, even though the Second Circuit did not issue its opinion until December 18, 2003. See *Rumsfeld* v. *Padilla*, 540 U.S. 1173 (2004) (expediting the briefing schedule); *Rumsfeld* v. *Padilla*, 540 U.S. 1159 (2004) (same). Thus, there is no reason to prevent the Fourth Circuit from considering the appeal on an expedited basis— as it has made special arrangements to do.

2. This Court could benefit substantially from the court of appeals' review of this case in its current posture.

a. Although petitioner contends (Pet. 6) that "[n]othing has changed" since this case last came before this Court, the record has changed substantially. As explained above, the government now possesses evidence that petitioner engaged in armed combat against United States and Coalition forces by taking up arms and affiliating himself with both al Qaeda and Taliban forces on the battlefields of Afghanistan during the time that our forces were engaged in combat operations there. See pp. 6-7, *supra*. Petitioner took cover in Afghanistan with other al Qaeda operatives in order to evade United States forces on the ground in Afghanistan as well as United States airstrikes. See *id.* at 3-4. Armed with an assault rifle, he later traveled with other al Qaeda operatives to Afghanistan, escorted by Taliban personnel. See *ibid.* Those critical facts were not available to the courts that previously considered petitioner's claims. See, *e.g.*, *Padilla* v. *Rumsfeld*, 352 F.3d 695, 700-701 (2d Cir. 2003) (reciting the factual allegations then in the record), rev'd, 124 S. Ct. 2711 (2004).

Those new facts are especially material in light of this Court's decision in *Hamdi*, which upheld the President's authority to detain a United States citizen who affiliated with a Taliban military unit in Afghanistan and remained with that unit following the attacks of September 11, 2001.

124 S. Ct. at 2637. If the military had captured and detained petitioner when he was still carrying an assault rifle on the battlefields of Afghanistan, this case could not be distinguished from *Hamdi*. The question whether petitioner could somehow shed that enemy combatant status by evading capture by United States forces in Afghanistan, and coming to the United States to launch more attacks here on behalf of al Qaeda, has thus far been addressed by a single judge—in the district court opinion below. Indeed, *no* court of appeals has yet had occasion to apply this Court's *Hamdi* decision in *any* enemy combatant case. Thus, this case presents important legal issues that have not yet been vetted by courts other than the district court below, in this case or in any other. See generally pp. 17-20, *infra*.[1]

This Court has addressed other important issues arising out of the war on terrorism after full consideration by the court of appeals. See, *e.g.*, *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711 (2004); *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004). This Court has also rejected prior requests for premature review in such cases. See, *e.g.*, *Hamdan* v. *Rumsfeld*, 125 S. Ct. 972 (2005) (denying petition for certiorari before judgment in enemy combatant case); *Moussaoui* v. *United States*, 125 S. Ct. 1670 (2005) (denying interlocutory petition for certiorari). There is no reason to follow a different course here.

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[1] The lack of any appellate precedent applying *Hamdi* distinguishes this case from others relied on by petitioner (Pet. 8, 11-12) in which this Court granted certiorari before judgment in light of conflicting lower court decisions. See, *e.g.*, *United States* v. *Fanfan*, 125 S. Ct. 12 (2004) (courts of appeals were in conflict and the Court also granted review of a court of appeals judgment in a companion case); *Dames & Moore* v. *Regan*, 453 U.S. 654, 667-668 (1981) (district court's order enjoining the Executive was contrary to holdings of two courts of appeals).

b. Review by the court of appeals would not only provide helpful guidance, it could also (contrary to petitioner's contention) "render it unnecessary for this Court to decide the fundamental question presented by this petition." Pet. 15. As noted above, the parties have assumed for purposes of petitioner's motion for summary judgment that the factual averments of the Rapp Declaration are true. See p. 7, *supra*. If the court of appeals were to hold that the President possesses authority to detain petitioner on those assumed facts, it would necessarily remand for further proceedings, including discovery and factfinding. Because such a decision would be interlocutory, this Court might well choose to deny certiorari at that time and await the outcome of the factual proceedings on remand. Indeed, if the lower courts ultimately disagreed with the averments of the Rapp Declaration, this Court's review might never be warranted—and, at a minimum, the factual development in the lower courts would focus the issues before this Court.

Such concerns about judicial economy have long animated this Court's reluctance to consider legal claims presented in an interlocutory posture, even in petitions taken after a court of appeals judgment. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of case "alone furnished sufficient ground for the denial" of the petition); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

The rationale underlying this Court's general practice applies with special force in the circumstances of this case. Here, petitioner has taken the extraordinary step of seeking certiorari before judgment to ask the Court to make potentially unnecessary determinations affecting the exercise of the President's core Commander-in-Chief and

foreign affairs authorities. Cf. *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring) (explaining that whenever possible, this Court will avoid passing upon a constitutional question). This Court's "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 466 (1989). That admonition has particular force with respect to matters involving foreign affairs, because "[f]oreign policy [is] the province and responsibility of the Executive." *Christopher* v. *Harbury*, 536 U.S. 403, 417 (2002) (internal quotation marks omitted). Especially in this context, where this Court has admonished the lower courts to "proceed with * * * caution," *Hamdi*, 124 S. Ct. at 2652 (plurality opinion), there is no reason to depart from the normal orderly process of appellate review.

3. a. Petitioner has not advanced a compelling argument to the contrary. Although petitioner cites (Pet. 12-15) a supposed need for immediate guidance regarding, *inter alia*, "the legitimacy or illegitimacy of the [government's purported use of] the enemy combatant threat in plea negotiations" in "terror-related criminal prosecutions nationwide," any decision in this case would likely have only limited relevance to such a diverse array of cases—most of which involve non-citizens, and none of which present the facts at issue here—especially in light of this Court's decision in *Hamdi*.

In *Hamdi*, a majority of the Court recognized the authority of the President to detain at least some citizens as enemy combatants. Moreover, as noted above, the controlling plurality opinion stressed that the lower courts should "proceed with the caution that we have indicated is necessary in this setting" by "engaging in a factfinding process that is both prudent and incremental." 124 S. Ct.

at 2652. Thus, "[t]he permissible bounds of the [enemy-combatant] category will be defined by the lower courts as subsequent cases are presented to them." *Id.* at 2642 n.1.

The lower courts are now doing just that. Depending on the court of appeals' decision, this Court's intervention may or may not eventually be warranted on the facts currently presented here. But there is no cause for pretermitting the lower courts' process, much less for assuming that any decision by this Court would apply broadly to many other enemy combatants. The question presented itself illustrates that point by focusing (Pet. i) on petitioner's United States citizenship and locus of capture. Since September 11, 2001, there have been only two cases (this one and *Hamdi*) involving United States citizens detained militarily in the United States as enemy combatants.[2]

Petitioner therefore errs in relying (Pet. 8, 12) on *United States* v. *Fanfan*, 125 S. Ct. 12 (2004), and *Mistretta* v. *United States*, 488 U.S. 361 (1989), in which this Court granted certiorari before judgment to determine the constitutionality of the Sentencing Guidelines under which *all* federal defendants are sentenced. If anything, the far more modest scope of the decision below serves only to underscore the inappropriateness of certiorari before judgment in this case.

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[2] Significantly, petitioner and Hamdi both associated with enemy forces while carrying assault rifles on the battlefields of Afghanistan, and petitioner also attempted to enter this country for the purpose of committing further attacks. See pp. 3-4, *supra*; *Hamdi*, 124 S. Ct. at 2637. As such, petitioner's alarmist contention (Pet. 9-10) that the Executive claims authority to designate individuals as enemy combatants because they gave charitable contributions intended for orphans or taught English to terrorists' offspring—a contention based solely on snippets from a transcript in a different case taken out of context—is wholly misplaced.

b. Petitioner's reliance (Pet. 11-12) on the institutional concerns of the Legislative and Executive Branches is especially misplaced. Congress remains free to act at all times (and in fact has done so by authorizing the President to use "all necessary and appropriate force" "to protect United States citizens both at home and abroad," AUMF, Pmbl., § 2(a)). Although the district court's decision marks a substantial judicial intrusion into the core Presidential function of determining how best to ensure the Nation's security (see pp. 19-20, *infra*), the Executive has determined that expedited review by the court of appeals will protect the government's interests at this time, a fact which further underscores the fact-specific nature of the district court's decision. The Executive is uniquely positioned to make that determination because, unlike a private litigant, the Executive has the responsibility to oversee this Nation's foreign relations and its fighting of an overseas war. Accordingly, petitioner's reliance on cases in which the government sought or acceded to a request for certiorari before judgment is misplaced. See Pet. 8 & n.5, 10-11 (citing *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974); *Kinsella* v. *Krueger*, 351 U.S. 470, 473 (1956); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937 (1952) (per curiam); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947); *United States* v. *Bankers Trust Co.*, 294 U.S. 240, 294-295 (1935)).

c. Petitioner's reliance (Pet. 10-11) on *Ex parte Quirin*, 317 U.S. 1 (1942), is likewise misplaced. Although this Court granted certiorari before judgment in *Quirin*, the petitioners there faced imminent execution. Petitioner does not face such a fate. Petitioner contends (Pet. 15-16) that he "has now spent almost three years in solitary confinement in a military brig," and review by the court of appeals would subject him to custody "for many months longer than

necessary." But it is unlikely that the court of appeals' expedited proceedings during this Court's summer recess will delay final resolution of the petition by "many months"; it is much more likely that the court of appeals' review will not cause any material delay. See pp. 9-10, *supra*.

Even if a delay of several months were to result, petitioner would not suffer irreparable harm because the granting of the writ would not entitle petitioner to release from federal custody in any event. Instead, petitioner would simply be entitled to a transfer from one type of custody (military) to another (civilian). See Pet. App. 29a n.14 ("[T]he Government can bring criminal charges against Petitioner or it can hold him as a material witness."); *id.* at 27a (listing crimes with which petitioner could potentially be charged). For that reason as well, petitioner's reliance on a liberty interest in release from confinement (Pet. 15-16) is misplaced.[3]

4. Although the petition does not argue the merits of petitioner's claims, a brief discussion of the merits helps to demonstrate both the substantial nature of the government's arguments for reversal of the district court's decision and the benefit that would accrue from permitting the ordinary appellate process to take its course. The same arguments, of course, are currently before the court of appeals, and should be left for that court's expedited resolution in the first instance.

The President has statutory and constitutional authority to detain petitioner as an enemy combatant. In *Hamdi*,

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[3] Although petitioner now contends (Pet. 16) that the conditions of his confinement have had a serious and harmful effect on his psychological well-being, petitioner has never challenged the conditions of his confinement in any judicial proceeding, or otherwise contended that he has been treated inhumanely. Instead, petitioner has challenged only the fact of his military detention, not its nature.

this Court confirmed that the military may seize and detain enemy combatants, including United States citizens, for the duration of the relevant conflict with al Qaeda. Specifically, this Court upheld the President's authority, under the AUMF, to detain as an enemy combatant a presumed American citizen who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 124 S. Ct. at 2639 (plurality opinion); accord *id.* at 2679 (Thomas, J., dissenting). That describes petitioner perfectly. Petitioner, like Hamdi, carried an assault rifle on the battlefields of Afghanistan. Petitioner, moreover, associated himself not just with Taliban forces (as did *Hamdi*), but with al Qaeda itself at a time when the United States was engaged in armed conflict against those forces. See pp. 3-4, *supra*. Thus, he is an enemy combatant under *Hamdi*.

The district court drew the opposite conclusion on the ground that petitioner was not *captured* in Afghanistan, but instead was captured in what the court considered to be a civilian setting in the United States. See Pet. App. 13a-14a. The district court cited no authority for the proposition that locus of capture is dispositive. Nor did it attempt to explain how petitioner could shed his enemy combatant status by escaping from United States forces in Afghanistan and coming to this country bent on commiting *more* hostile acts. Instead, the court stated that "the cogency of [the government's] argument eludes this Court." Pet. App. 14a. Perhaps as a result, the district court never articulated a theory as to how petitioner's evasion of United States forces in Afghanistan, and choice to come here to commit further hostile acts, could possibly make him *less* of an enemy combatant.

Indeed, those actions make him *more* of an enemy combatant, because he falls not only with this Court's definition of enemy combatant employed in *Hamdi*, but also within the scope of this Court's holding in *Quirin* that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war." 317 U.S. at 37-38. By closely associating with al Qaeda, receiving training from al Qaeda, and coming to the United States at al Qaeda's direction and with its assistance to advance the conduct of attacks against the United States (see pp. 3-4, *supra*), petitioner placed himself squarely within that definition of enemy combatant.

The district court attempted to distinguish *Quirin* on the ground that "the *Quirin* Court's decision to uphold military jurisdiction rested on * * * express congressional authorization," whereas in this case "no such Congressional authorization is present." Pet. App. 16a, 18a (internal quotation marks omitted). But even assuming *arguendo* that a clear congressional statement is required, Congress provided one in the AUMF, which broadly authorizes 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 * * * in order to prevent *any* future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a) (emphases added).[4] As

[4] In any event, *Quirin* did not require a clear statement of congressional intent to authorize military detentions. Quite the opposite is true: the Court noted that a "detention * * * ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war" is "not to be set aside by the courts

this Court held in *Hamdi*, "Congress' grant of authority for the use of 'necessary and appropriate force' * * * include[s] the authority to detain for the duration of the relevant conflict." 124 S. Ct. at 2641 (plurality opinion); see *id.* at 2679 (Thomas, J., dissenting).

The district court nonetheless concluded that it was not "necessary and appropriate" to detain petitioner as an enemy combatant because he was captured in the United States. Pet. App. 15a. That remarkable conclusion not only intrudes on the Commander in Chief's authority to determine what force is necessary and appropriate, see, *e.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850); not only reads the AUMF's *grant* of authority as a limitation of authority; and not only ignores almost 200 years of jurisprudence in which phrases like "necessary and appropriate" have been read broadly, not in a narrow restrictive sense, see, *e.g.*, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819); it also ignores Congress's determination in the AUMF that it *is* "necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens *both at home and abroad*." AUMF, Pmbl. (emphasis added). Congress's manifest intent was to authorize actions to prevent another terrorist attack in *this* country. See § 2(a), 115 Stat. 224. Indeed, Congress was directly responding to attacks on the United States homeland, launched a week earlier by combatants within the Nation's borders. Accordingly, the AUMF cannot plausibly be read to authorize detentions abroad while simultaneously withholding support for the detention

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without the clear conviction that [it is] in conflict with the * * * laws of Congress." 317 U.S. at 25. Nor does 18 U.S.C. 4001(a) require a clear statement, because that statute addresses only the detention of citizens by civilian authorities; it does not purport to restrict the military's longstanding authority to detain enemy combatants.

of combatants found within the United States—*i.e.*, combatants identically situated to those who carried out the September 11 attacks.

Even if the AUMF did not authorize petitioner's detention with sufficient clarity, the President would still have inherent authority as Commander in Chief to order the military detention of combatants affiliated with al Qaeda who enter the United States bent on committing hostile and warlike acts. Notwithstanding the district court's contrary conclusion (Pet. App. 24a-26a), the Commander-in-Chief Clause grants the President the power to defend the Nation when it is attacked, including the authority to "determine what degree of force the crisis demands." *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863); see *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring), cert. denied, 531 U.S. 815 (2000).

Even this brief review of the issues underscores the benefit of permitting the court of appeals to undertake expedited review. The court of appeals' decision would provide guidance on sensitive issues of first impression that implicate important considerations of national security. The court of appeals might also resolve the government's appeal in ways that could make further review inappropriate or unnecessary at this time. Consideration by the courts of appeals streamlined the litigation in the earlier round of this litigation as well as in *Hamdi* and *Rasul*, and is now sharpening similarly sensitive issues in *Hamdan* v. *Rumsfeld*, another enemy combatant case in which this Court recently denied a petition for certiorari before judgment. See 125 S. Ct. 972 (2005). There is no reason to follow a different course here.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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MAY 2005