Hamdi Narrative
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When Frank Dunham and I met Yaser Esam Hamdi[1] for the first time in a small room at the Navy brig in Charleston, South Carolina, he was dressed in an orange jumpsuit, and a heavy chain led from his ankles to a post in the floor. But his broad smile, easy laughter, enthusiastic if imperfect use of slang (undoubtedly learned from his guards over the course of the prior two years), and warm regard toward American culture suggested that Hamdi was not the terrorist fighter the U.S. government said he was.

"I really want to get out of here because I am just chilling." Those are among the first words Yaser Esam Hamdi said to us when we met that day in February 2004. When shown news articles about his case, Yaser said, "I am a famous boy."

Indeed, Mr. Hamdi was neither a combatant nor a terrorist, and he never fought against U.S. troops in Afghanistan or anywhere else. These basic facts often get lost in the "imprison-first-ask-questions-years-later" detention policy devised by the Bush administration after September 11. They were also impossible for Dunham, the former Federal Public Defender for the Eastern District of Virginia, and I to know during the first two years that we represented Mr. Hamdi in federal court—all while Mr. Hamdi was held incommunicado and without criminal charges inside the United States.

Frank Dunham passed away from cancer on November 3, 2006, but I know that representing and securing the release of Yaser Hamdi was one of the proudest achievements of his life.

Until February 2004, three months before Frank argued Hamdi's case before the Supreme Court, we did not know whether Mr. Hamdi knew that he had lawyers fighting for his release, or even that our country's highest court had accepted his case for review. By that time, Frank and I had represented Mr. Hamdi for almost two years, argued three appeals before the Fourth Circuit Court of Appeals, received four published rulings, petitioned for Supreme Court review, and were preparing our merits briefs before the high court.

We also knew only the barest information about our client. The first person held in the United States as a so-called "enemy combatant" since World War II, Mr. Hamdi was born in Baton Rouge, Louisiana. He spent the first three years of his life in the United States while his father, from Saudi Arabia, worked for an oil company. Raised in Saudi Arabia, Mr. Hamdi began attending a university there before he made his way to Afghanistan a few weeks before September 11, 2001, seeking an ascetic break from his college studies. In late 2001, Mr. Hamdi was handed over to the U.S. military by the Northern Alliance, and subsequently sent to Guantánamo Bay, Cuba. When it was discovered that he was born in the United States, Mr. Hamdi was flown to Washington, D.C., and then to the naval base in Norfolk, Virginia.

Frank Dunham was appointed Federal Public Defender for the Eastern District of Virginia in 2000. Within two years, Dunham established offices in Norfolk, Richmond, and Alexandria, Virginia, to represent indigent defendants facing criminal charges in federal court. His first client, appointed by the federal district court in Alexandria, was Zacarias Moussaoui, the mentally

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1 Yaser's father says the family name was actually misspelled on Yaser's U.S. birth certificate, and should read "Himdy." For convenience, I have maintained the spelling used during the litigation.

unstable French citizen of Algerian descent alleged to be a member of al Qaeda. Shortly after the court appointed the federal public defender to represent Moussaoui, John Walker Lindh faced criminal charges in the same courthouse for his assistance to the Taliban.

When Frank read about Mr. Hamdi's detention in Norfolk in April 2002, he had every reason to believe that Yaser would face charges similar to those brought against Lindh. For that reason, he directed Larry Shelton, the head of the Norfolk office, to write a letter to the commander of the Navy brig asking to meet with Mr. Hamdi. Shortly thereafter, Frank asked Shelton to find someone to draft a habeas corpus petition for Mr. Hamdi seeking his release. As the youngest, newest, and least experienced attorney in that office, I was the natural choice.

At the time, the U.S. government was holding Mr. Hamdi in solitary confinement at a Navy brig in Norfolk, Virginia, and it had no intention of allowing a lawyer to meet him. When we filed a petition for a writ of habeas corpus in May 2002 on Mr. Hamdi's behalf to challenge his detention, the government claimed that it alone had the authority to decide whether Mr. Hamdi was lawfully detained. This was an unprecedented and dangerous claim. Had the Supreme Court not rejected it in 2004, it would have stripped away the right of any detainee held as a so-called enemy combatant, either within or without the country, at Guantánamo Bay or elsewhere, to ever contest their imprisonment in a courtroom. Shortly after the Court upheld his right to challenge his detention, we negotiated Mr. Hamdi's release, and he now resides in Saudi Arabia. Within a year of his return he was married, resumed his university studies, and had a daughter.

The internment of detainees in Guantánamo and the imprisonment of Yaser Hamdi represent a fundamental challenge to America's commitment to principles of justice and a government constrained by the rule of law. But as the path to Guantánamo has become well-traveled by lawyers at long last allowed to meet their clients, representation of Mr. Hamdi began with no familiar guideposts, no military escort to drive us to client meetings, and no direct legal precedent less than fifty years old.

In those days, there were only a handful of other lawyers representing so-called enemy combatants. Donna Newman and Andy Patel had been appointed in New York to represent Jose Padilla approximately a month after we filed Hamdi's habeas petition. Meanwhile, Michael Ratner, Joseph Margulies, and Tom Wilner were in the early stages of representing Guantánamo detainees. Professors Tony Amsterdam and Eric Freedman generously offered their counsel to all of us. But public opinion at the time appeared squarely behind the Bush administration, and no one knew how the Supreme Court would react to these cases.

Prisoners of all kinds have a right to challenge their confinement through habeas corpus by virtue of federal law and the Constitution. But as a general matter, a habeas petition must be signed by the prisoner himself. Mr. Hamdi, of course, was incapable of signing a habeas petition because he was being held by the military incommunicado. The federal district judge assigned to handle the habeas petition, the Honorable Robert G. Doumar of the Eastern District of Virginia, naturally assumed that this was precisely the type of case in which the petitioner's signature was not required. He therefore permitted the case to be filed and promptly ordered the military to allow Frank and Larry Shelton to meet Mr. Hamdi.

Within hours of Judge Doumar's decision, however, the United States Solicitor General's office filed an emergency interlocutory appeal with the Fourth Circuit challenging Dunham's ability to file a petition on Mr. Hamdi's behalf. And the Fourth Circuit, remarkably, ordered us to

respond within two hours of our receipt of the government's brief—notwithstanding prior case law holding that orders permitting the filing of a habeas petition on behalf of a prisoner are not immediately appealable. The court scheduled oral argument to take place the following week in Richmond, Virginia. The speed with which the court acted was unusual, to say the least, and foreshadowed the Fourth Circuit panel's dim view of our efforts on Mr. Hamdi's behalf.

In fact, questioning by the appellate panel was so hostile that as soon as we left the argument, we decided to file a new petition signed by Mr. Hamdi's father so that a petition would be filed before the Fourth Circuit ruled. As expected, the Fourth Circuit in short order held that Dunham could not file a petition on Mr. Hamdi's behalf because he had never met him. The fact that the military imprisoned Mr. Hamdi incommunicado, and thus prevented him from meeting with counsel, was no excuse. But before the court issued its ruling against us, we had already filed a new petition signed by Mr. Hamdi's father, thanks to DHL's overnight international service.

The litigation thus proceeded on the new petition, and Judge Doumar promptly ordered the military to allow us to meet with Mr. Hamdi once again. And once again, the U.S. Solicitor General's office filed an emergency interlocutory appeal to prevent Mr. Hamdi from meeting with his lawyers. And once again, the Fourth Circuit scheduled a prompt oral argument—this time by telephone—and ordered us to file a brief within twenty-four hours of receipt of the government's brief.

On appeal, the government argued in a circle that because Mr. Hamdi was an "enemy combatant," he had no right to meet with a lawyer to contest the claim that he was an "enemy combatant." The Fourth Circuit then endorsed this view, holding that the district court should have considered the merits of the habeas petition before allowing Mr. Hamdi to meet with counsel. Before anything else, the court of appeals ruled, the district court should address whether a two page unsworn declaration was enough, by itself, to find in favor of the government.

On remand, Judge Doumar held a hearing to determine whether he could decide the merits of the habeas petition based solely on a two-page unsworn declaration by someone in the defense department named Michael Mobbs. On August 16, 2002, Judge Doumar concluded that the declaration was not enough to support the detention, and ordered the government to produce the basis for its determination that Hamdi was an enemy combatant.

And for the third time, the same Fourth Circuit panel reversed Judge Doumar. This time, however, the court of appeals ordered that Hamdi's petition should be dismissed. The fact that Hamdi had purportedly conceded that he was picked up in Afghanistan was enough, the court held, to justify his indefinite imprisonment as an "enemy combatant." Of course, Hamdi had not up to that point been allowed to meet with his lawyers, much less concede the location of his capture. This point did not escape the notice of at least a few judges on the Fourth Circuit who dissented from the denial of our petition for rehearing, not least among them Michael Luttig, the conservative jurist who left the bench to return to private practice in 2006. The panel opinion "is unpersuasive," Luttig wrote, "because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's seizure as 'undisputed,' when those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances."

When Hamdi's case reached the Supreme Court, two basic issues were before the Justices: (1) what authority exists to detain an American citizen as an "enemy combatant;" and (2) was Hamdi entitled to challenge the factual basis for his detention? The Fourth Circuit's decision

ordering the dismissal of Hamdi's habeas petition had agreed with the government that the Constitution vests the president with the authority to detain individuals, including citizens, captured in armed conflict overseas and that any inquiry into the factual basis for such detentions would violate the separation of powers.

With respect to the first question, the government argued not only that it enjoyed inherent power to detain Hamdi but also that Congress, by virtue of a law passed one week after the September 11, 2001, attacks, had authorized the president to detain enemy combatants seized in Afghanistan. That law is known as the Authorization for the Use of Military Force (AUMF). The AUMF authorized the President to:

> Use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

The oral argument took place on April 28, 2004, and it was Frank's second argument before the Court in less than a month. He told me later that he learned at his first argument that the Justices would remain relatively quiet during his rebuttal. For that reason, he was able to give a remarkable closing statement that actually challenged the Court to honor the Great Writ:

> We have a small problem here. One citizen—we're not talking about thousands—one citizen caught up in a problem in Afghanistan. Is it better to give him rights or is it better to start a new dawn of saying there are circumstances where you can't file a writ of habeas corpus and there are circumstances where you can't get due process? I think not.
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> I would urge the Court to find that citizens can only be detained by law. And here there is no law. If there is any law at all, it is the executive's own secret definition of whatever "enemy combatant" is. And don't fool yourselves into thinking that means somebody coming off a battlefield because they've used it in Chicago, they've used it in New York, and they've used it in Indiana. . . .
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> Congress tomorrow could take these military regs and they could say, "This is the law. We authorize the executive to detain people and to give them hearings the way the military says," and then it would be lawful. But Congress hasn't done that, and I respectfully submit, Your Honor, that until Congress does that, these detentions are not lawful. And I would respectfully ask this Court to step up to the plate and say so."

A plurality of the Court, in an opinion authored by Justice O'Connor and joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, concluded that (1) Congress had authorized the detention of persons who were "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" in Afghanistan, but that (2) a citizen detainee is entitled to notice of the allegations underlying the detention, access to counsel, and a fair hearing before a neutral tribunal. The plurality emphasized that Congress's authorization to detain was not a "blank check," and was subject to both judicial

review and procedural due process.

Justice Souter, in a concurring opinion joined by Justice Ginsburg, rejected the plurality's conclusion that Congress had authorized the non-criminal detention of citizens in the absence of a clear and explicit expression permitting such detentions. Nonetheless, Justice Souter agreed that a citizen detained as an enemy combatant would be entitled to challenge the factual basis for the detention.

Justice Scalia, in a dissenting opinion joined by Justice Stevens, argued that the Constitution prohibited the government from detaining, without criminal charge, a citizen seized in armed conflict. Finally, Justice Thomas dissented on the ground that the judiciary has no role to play in determining whether a detainee is in fact an "enemy combatant."

Shortly after the opinion was issued, Frank sent a letter to the Solicitor General's Office renewing a request he had made several times before, most recently before the oral argument, to settle the case. This time, however, we received a favorable response and promptly began to negotiate the terms under which Mr. Hamdi would be allowed to return home to Saudi Arabia. Although the government originally sought an agreement that would have prevented Yaser from ever returning to this country, we successfully negotiated a provision that would permit him to return (as long as the Secretary of Defense and the Secretary of the Department of Homeland Security agreed), because Yaser hoped to travel here some day as a tourist.

Less than six months after Hamdi was released from the Navy brig and returned to Saudi Arabia, Frank Dunham was admitted to the hospital with a diagnosis of brain cancer. At that time, I called Yaser in Saudi Arabia to convey that news. I also wanted to see if Yaser and his father could call Frank because I thought it would cheer Frank up to hear from his second-most famous client (the first, Zacarias Moussaoui, had stopped listening to Frank a long time ago). I did not want Yaser and his father to hear about Frank's illness from anyone else.

My call occurred before Frank's illness became widely known, and months before it was reported in the *Washington Post*. It has since occurred to me, however, that my private call may not have been private at all, but instead may have been monitored by the National Security Agency without my knowledge and without a warrant.

The opinions in Hamdi, however, confirm that such a unilateral executive power over U.S. citizens, exempt from judicial oversight, does not exist. As the plurality stated, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." In other words, even in the context of the detention of enemy soldiers arising out of military combat—conduct that is close to the core of the Executive branch's basic responsibility in wartime—judicial oversight is necessary when such power implicates the rights of American citizens. If the Court's decision in Hamdi rejected the unilateral executive detention of citizens without judicial review in the context of prisoners of war, it certainly does not permit unilateral executive surveillance of citizens without judicial oversight of activities far less central to the conduct of warfare. The Constitution therefore promises judicial and congressional oversight of executive actions that implicate civil liberties, not a unilateral

executive branch determination that it has a “reasonable basis to believe” that such actions are necessary.

Of course, the most important consequence of the litigation was the release of someone who was never a threat to the United States, never joined its enemies, and, amazingly, bears no ill will toward this country. “I really appreciate it,” he said to me shortly before his release. “I really appreciate you guys.”