

No. 02-7338

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

YASER ESAM HAMDI et al.,

Petitioners / Appellees,

v.

DONALD RUMSFELD et al.,

Respondents / Appellants.

**On Appeal from the United States District Court
for the Eastern District of Virginia
Civil Action No. 2:02CV439**

**APPELLEE'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC**

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**APPELLEE’S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC**

Pursuant to Federal Rules of Appellate Procedure 40 and 35, Appellee petitions the Court for rehearing and suggests that the Court rehear the case in banc. The petition is timely filed within 45 days of the Court’s January 8, 2003 judgment.

STATEMENT OF PURPOSE

Appellee Yaser Esam Hamdi (“Hamdi”), by next friend, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 to challenge his indefinite incommunicado detention without process or charge in a naval brig in Norfolk, Virginia. A unanimous panel of this Court rejected this challenge without first giving Hamdi an opportunity to meet with counsel appointed by the district court, be apprised of the allegations against him, or dispute them in any way, and ordered that the petition be dismissed.

The interlocutory appeal in this case arose from an order addressing the sufficiency of the factual record for purposes of judicial review. The factual record consists entirely of the two-page declaration of Michael Mobbs submitted by Appellants as a factual basis for Hamdi’s detention as an “enemy combatant.”

On August 8, 2002, the panel issued an Order directing the district court to “consider the sufficiency of the Mobbs declaration as an independent matter before

proceeding further.” (J.A. 149.) Read in conjunction with this Court’s earlier opinion in *Hamdi v. Rumsfeld*, 296 F.3d 278 (2002), the district court in effect was directed to determine based on this declaration alone whether Hamdi could be designated an enemy combatant without ever granting counsel access to the petitioner or giving the petitioner a chance to be heard regarding the averments against him in the declaration. The district court accordingly set aside all other issues in the case and held a hearing to address solely whether the Mobbs Declaration was sufficient to justify Hamdi’s designation as an “enemy combatant.”

On August 16, 2002, the district court issued an order holding that the Mobbs Declaration was insufficient, standing alone, to support Hamdi’s designation as an enemy combatant, and ordered Appellants to produce additional information regarding Hamdi’s status. Appellants obtained certification of that order and the panel authorized interlocutory appellate review pursuant to 28 U.S.C. § 1292(b).

On January 8, 2003, the panel reversed the district court’s August 16, 2002, order, and ruled that Hamdi’s petition should be dismissed. *Hamdi v. Rumsfeld*, 316 F.3d 450 (2003). Specifically, the panel found that “[b]ecause it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, . . . the submitted declaration is a sufficient basis upon which to conclude that the

Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution.” *Id.* at 459. Additionally, the panel considered several issues that were ancillary to the dispute over the sufficiency of the Mobbs Declaration and which the district court had not yet addressed because of the panel’s earlier direction to first address the Mobbs Declaration. For example, the panel rejected arguments—raised but not addressed prior to the certification of the district court’s order—that the armed conflict that provided the basis for Mr. Hamdi’s detention was over, and that Mr. Hamdi is entitled at the very least to a determination of his status in accordance with the Geneva Convention Relevant to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 (J.A. 263-306) (“GPW”). In considering this latter issue, the panel ignored the application of military regulations designed to implement the GPW, an issue that also was raised but not addressed below. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) (J.A. 91-126) (“EPW Regulations”).

Although painstaking in its effort to resolve this difficult case of first impression, the panel’s decision that Hamdi’s petition for a writ of habeas corpus should be dismissed contains an error of material fact as well as mistakes of law that conflict with prior Supreme Court opinions and this Court’s precedent. In

addition, because this case involves questions of exceptional importance, Mr. Hamdi respectfully requests rehearing and rehearing en banc.

ERRORS OF LAW AND FACT

A. The panel erred as a matter of law and exceeded its jurisdiction when it addressed issues outside the scope of review permitted under 28 U.S.C. § 1292(b), particularly in light of its August 8, 2002, Order defining the question to be addressed by the district court “before proceeding further.”

B. When considering the application of the Geneva Convention Relevant to the Treatment of Prisoners of War, the panel erred as a matter of law by failing to address the implications of the military’s own regulations designed to implement the GPW. The military’s failure to follow its own regulations required the district court to engage in a factual inquiry in the first instance.

C. Hamdi has been denied the opportunity to communicate with counsel or confront the factual assertions submitted in support of his continued detention. Nevertheless, the panel asserted that “it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict.” 316 F.3d at 459 (emphasis added.) By describing this fact as “undisputed,” the panel made a critical factual error which undermines the rationale for its decision that the petition must be dismissed without further proceedings in the district court.

D. It is well-settled that Hamdi is entitled to release at the conclusion of the armed conflict with the Taliban, and that in determining whether this conflict has ended courts are limited to construing statements and official proclamations of the political branches of government. The panel erred as a matter of law by drawing its own inferences regarding the nature of the conflict in Afghanistan from facts other than public statements made by the political branches.

ARGUMENT

I. The Panel Lacked Jurisdiction To Review Any Issues On Appeal Other Than Whether the Mobbs Declaration Was Sufficient To Support the Enemy Combatant Designation

On August 8, 2002, the panel directed the district court on remand to consider the adequacy of the Mobbs Declaration to support Hamdi’s designation as an enemy combatant before “proceeding further.” (J.A. 149.) The district court faithfully followed this direction and refused to address other issues, including legal arguments that might have resolved this dispute without any factual inquiry.¹ By ruling on these issues after expressly forbidding the district court from considering these questions in the first instance, the panel committed error and exceeded its jurisdiction.

¹ “As far as I’m concerned here today, the Court of Appeals has said I have to determine if the Mobbs Declaration is sufficient. I realize that you consider the habeas [petitioner] should have certain rights, a person in this proceeding; however we’re concerned with the sufficiency of the Mobbs Declaration.” Aug. 13, 2002, Tr. at 63 (J.A. 386.)

As the panel correctly noted, pursuant to 28 U.S.C. § 1292(b), “the appellate court may address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court.” *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). The panel failed to recognize, however, that “[e]ven if the Court of Appeals’ jurisdiction is not confined to the precise question certified by the lower court . . . , that jurisdiction *is* confined to the particular order appealed from.” *United States v. Stanley*, 483 U.S. 669, 677 (1987) (emphasis in original).²

The panel opinion points out that arguments in support of or against a district court’s “dispositive” ruling are subject to appellate review under § 1292(b). 316 F.3d at 467. But the application of the Geneva Convention and the

² Courts and commentators therefore agree that courts of appeals do not have jurisdiction to address issues that have not yet been ruled upon by the district court. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 764 (3d Cir. 1974) (“We cannot exercise appellate jurisdiction [pursuant to § 1292(b)] over an issue not yet decided in the district court.”) (en banc); *see also S.E.C. v. U.S. Environmental, Inc.*, 155 F.3d 107, 113 (2d Cir. 1998) (same); *Jobin v. Boryla*, 75 F.3d 586, 589 n.4 (10th Cir. 1996) (same); *Adkinson v. Int’l Harvester Co.*, 975 F.2d 208, 211 n.4 (5th Cir. 1992) (same); *Lane v. First National Bank*, 871 F.2d 166, 175 (1st Cir. 1989) (rejecting “invitation to expand the scope of review under section 1292(b) beyond the borders of the question which we originally certified”); *United States v. Bear Marine Services*, 696 F.2d 1117, 1118 n.1 (5th Cir. 1983) (“The order certified to us concerned only IMTT’s exclusivity argument. We do not have jurisdiction over any issues not raised by that order.”); 9 Wright, Miller, & Cooper, *Fed’l Practice & Procedure* § 3929 (2d ed. 1996) (“Even more clearly the court of appeals will not consider matters not yet ruled upon by the district court.”); 19 *Moore’s Fed’l Practice* § 203.32[3][a] at 203-103 (3d ed. 1997) (same).

determination whether the armed conflict with the Taliban has terminated constitute separate issues from those related to the Mobbs Declaration, and illustrate that the district court's order was anything but dispositive. In fact, as the panel observed, a decision on these issues could have rendered unnecessary any factual inquiry at all regarding Hamdi's designation. *Id.* at 466-67. This observation merely confirms that these matters remain independent of the sole issue the district court was directed by the panel to address and which is the subject of the certified order. Although "the temptation is great when an interlocutory appeal is properly taken from one order, and the record is before" the appellate court, "to consider everything on a sort of ad hoc pendent jurisdiction basis," *Garner v. Wolfenbarger*, 433 F.2d 117, 120 (5th Cir. 1970), § 1292(b) did not authorize the panel to do so, particularly given its earlier direction to the district court requiring it to start with the Mobbs Declaration. Without the benefit of developed argumentation in the district court, the panel proceeded to err in its resolution of these separate issues, as discussed below.

II. The Case Should Have Been Remanded for an Evidentiary Hearing

A. The Panel Erred By Ignoring the Military's Regulations Designed to Implement the Geneva Convention

Instructed by the panel to consider the Mobbs Declaration before proceeding further, the district court specifically declined to address "the legal effect of the

GPW or the Joint [EPW] Regulations,” finding that a resolution of these issues “would be premature at this point in the proceedings.” (J.A. 430.) Disregarding the absence of a district court ruling on these issues, the panel proceeded to limit consideration of the GPW to whether the treaty is self-executing and ignored the legal effect of existing military regulations specifically designed to implement the GPW. These military regulations “have the force of law,” *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942); accord *Billings v. Truesdell*, 321 U.S. 542, 551 (1944), and this Court has not “hesitat[ed] in directing the military to comply with its own regulations where it has been shown that a regulation was not followed.” *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970); accord *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, 706 (4th Cir. 1969).³

The EPW Regulations are designed to “implement international law,” including the GPW, EPW Reg. 1-1(b) (J.A. 95), and are issued pursuant to the Secretary of Defense’s authority to promulgate regulations governing his department. See 10 U.S.C. § 113; 5 U.S.C. § 301; Dep’t Defense Directive 2310.1.

³ Like regulations issued by administrative agencies, military regulations “once issued must be followed scrupulously,” *Clifford*, 409 F.2d at 706, because “when the sovereign has established rules to govern its own conduct it will be held to the self-imposed limitations on its own authority, departure from which denies procedural due process of law.” *Bluth*, 435 F.2d at 1071; cf. *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (authorizing habeas challenge based on Board of Immigration Appeals’ failure to follow own regulations); *Bridges v. Wixon*, 326 U.S. 135, 152-54 (1945) (holding failure to follow deportation rules violated due process).

Pursuant to these regulations, “[i]n accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” EPW Reg. 1-6 (J.A. 96.)⁴ If Hamdi had been provided such a hearing before a competent tribunal as the military’s regulations require, the district court simply could have reviewed the record of the military proceeding as the Supreme Court reviewed the proceedings in *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

It is only because Hamdi has been neither treated as a prisoner of war nor afforded a tribunal in accordance with the EPW regulations that the need for factual development in the district court arose.⁵ The district court thus had no

⁴ With the exception of deliberations, tribunal proceedings must be open, and the detainee is entitled to attend the proceedings, call witnesses if reasonably available, “testify or otherwise address the Tribunal,” or refuse to testify. EPW Reg. 1-6 (J.A. 97.) Furthermore, tribunals must apply a preponderance of evidence standard to determine whether the detainee is lawfully detained or an “[i]nnocent civilian who should be immediately returned to his home or released.” *Id.*

⁵ Hamdi has not been held as a prisoner of war. He has been held in solitary confinement in a jail for well over a year. Unlike a prisoner of war, Hamdi is being punished as if he were an unlawful combatant despite the absence of any determination that he has violated the laws of war. *See In re Medley*, 134 U.S. 160, 168-71 (1890).

choice but to conduct its own inquiry into the propriety of Hamdi's designation. *Cf. Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality) (courts empowered to review a habeas petitioner's claims of error in military trials "de novo" if the military "manifestly refused to consider" those claims). Before doing so, the district court showed substantial deference to the Executive Branch by offering it an opportunity to conduct such a proceeding, but Appellants declined. (J.A. 405.) Far from encroaching on the Executive's Article II prerogatives, by holding a de novo factual inquiry the district court would have been doing only what the military itself was already required to do under its own regulations.⁶

B. At a Minimum, Further Factual Inquiry Is Required As to Whether Hamdi Was Seized In a Zone of Active Combat Operations

Congress has set forth the governing procedures for adjudicating petitions for a writ of habeas corpus at 28 U.S.C. § 2241 and § 2243. These statutes provide that a petitioner will have an opportunity to contest facts on which his detention is based.

⁶ The panel's concern that soldiers must not be diverted from their military objectives by being called "to account in [their] own civil courts," 316 F.3d at 466, is both misplaced, because the case relied upon by the panel specifically excludes American citizens from the scope of the decision, *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950), and mitigated by the existence of military regulations not in effect when *Eisentrager* was decided that contemplate factual hearings analogous to the one initiated in the district court.

The panel concluded, however, that an Article III court cannot apply the process outlined in § 2241 and § 2243 to adjudicate a habeas petition filed by an American citizen under the circumstances enumerated by the panel in this case without impermissibly encroaching upon the President's Commander in Chief powers as provided in Article II of the Constitution. To avoid this perceived separation of powers problem, the panel held that an American citizen initially detained on foreign soil, designated as an enemy combatant, but now detained in a Navy brig in Norfolk, Virginia, has no right in a habeas corpus proceeding to refute facts alleged by the Executive branch as grounds for his detention. In essence, the panel has ruled that, under these circumstances, 28 U.S.C. § 2243 is unconstitutional or otherwise without effect and does not permit American citizens to challenge the factual basis for their seizure even when that means those citizens will be held indefinitely without charge or trial.

Recognizing the significance of this holding, the panel limited the sweep of its opinion geographically to apply only to detentions of Americans initiated in a zone of active combat operations in a foreign country. 316 F.3d at 476. In doing so, the panel rejected Appellants' argument that all detentions of persons designated by the Executive branch as enemy combatants should be insulated from factual inquiry in an Article III court regardless of where the seizure might occur.

This geographic limitation imposed by the panel requires an initial factual inquiry to be conducted by the district court. That is, whether or not a U.S. citizen detained as an enemy combatant was “captured” or “seized” within or without a zone of active combat operations in a foreign country is itself a fact that may be subject to dispute. Consequently, that fact must be determined by the district court before it can ascertain whether the ordinary scope of review in a habeas case must be circumscribed to avoid a conflict with the Executive’s Article II powers. Indeed, a court always has the implicit right to conduct a factual inquiry essential to ascertain the scope of its own jurisdiction. *See Crowell v. Benson*, 285 U.S. 22, 60-64 (1932).⁷

The factual error we assert therefore is critical to the logic of the panel’s decision. Because Hamdi was denied the opportunity to meet with counsel, and was refused the opportunity to dispute the facts put forth by Appellants—including assertions as to where he was captured and what the circumstances were at the time—it cannot fairly be stated that it is “undisputed” that Hamdi was captured

⁷ Moreover, a habeas petitioner must be allowed to challenge the Executive’s assertion that the petitioner was in a zone of active combat operations in a foreign country at the time he was seized. Without the right to challenge this basic fact, the geographic limitation the Court seeks to draw becomes unenforceable. In other words, all the Executive need do, if the location of seizure is unchallengeable, is assert that the detainee was detained in a zone of active combat operations and the Court would have no choice but to accept it along with any other fact advanced by the government in support of the detention.

within a zone of active combat operations in a foreign country.⁸ Accordingly, despite the thrust of its ruling, i.e, that a district court is limited in its review of a habeas petition from a person detained in an active zone of combat operations in a foreign country, the panel prematurely ordered dismissal rather than remanding the case to permit the district court to determine factually whether Hamdi actually was seized in a zone of active combat operations. At the very least, Hamdi should be allowed to participate in this proceeding for purposes of this threshold determination.

III. The Panel Erred When It Relied On Anecdotal Evidence of Continued Fighting In Afghanistan To Hold That the War With The Government of Afghanistan Is Not Over

Counsel, on behalf of Hamdi, contend that even if he was a Taliban soldier captured in a zone of active combat on foreign soil, he is entitled to release because the war with the Taliban government of Afghanistan is over. The panel concluded, however, that the conflict with the Taliban government of Afghanistan has not

⁸ It can be said to be “undisputed” only if the entire country of Afghanistan is what the panel considered to be a “zone of active combat operations” at the time of Hamdi’s capture. Not only does the only factual information in the case, the hearsay Declaration of Michael Mobbs, not support such an expansive view of the term, to so define it would allow unreviewable Executive detention of any U.S. citizen anywhere in Afghanistan whether or not that citizen was even in remote proximity to an active combat operation. It is hard to see how review of a detention somewhere in Afghanistan far removed from the site of an active zone of combat operations would interfere with prosecution of the President’s Article II powers.

ended because American forces remain in Afghanistan and fighting remains on-going. 316 F.3d at 476. The panel's resolution of this issue is contrary to established precedent.

Notwithstanding Appellants' representations that American troops remain in Afghanistan and the panel's observation that fighting continues, the factual record (the Mobbs Declaration), is silent with regard to these facts. More importantly, a court confronted with deciding the question of whether a war has ended in order to adjudicate other issues in a case may not rely on its own factual determinations or even the averments of the litigants.

Only the political branches of government can decide when a war has ended, *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948); *The Protector*, 79 U.S. 700, 702 (1871); *The Prize Cases*, 67 U.S. 635, 670 (1862). Consequently, courts are limited to looking to the public pronouncements of the other branches of government to answer this question. If these public statements are ambiguous, a court must do its best to construe them. *Baker v. Carr*, 369 U.S. 186, 212 (1962). It is clear, however, that the existence of American troops who are engaged in fighting on foreign soil is insufficient to establish that a war remains on-going. *See Lincoln v. United States*, 197 U.S. 419, 429 (1905). The panel's ruling that it could decide whether the war with the Taliban government was over based on anything other than the public statements of the political branches flies in the face of well-

established precedent as to how courts are to establish when or whether a war has ended.

Pronouncements of the Executive branch make clear that the Taliban government no longer controls any territory within Afghanistan, Modification of Description of “Territory of Afghanistan Controlled by the Taliban” in Executive Order 13129, 67 Fed. Reg. 4301 (Jan. 29, 2002), and that the armed conflict with the Taliban has ended with an American victory.⁹ There being no allegation that Hamdi has committed any war crime or that he is a member of al-Qaeda, the non-state actor with whom hostilities presumably continue, Hamdi is entitled to release.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the panel rehear this matter, or in the alternative that the Court hear this matter in banc.

⁹ See Amendment to the List of Proscribed Destinations in the International Traffic in Arms Regulations, 67 Fed. Reg. 44352 (July 2, 2002); Proclamation 7582 of Aug. 14, 2002, 67 Fed. Reg. 53723 (Aug. 19, 2002); Proclamation 7584 of Aug. 23, 2002, 67 Fed. Reg. 55317 (Aug. 28, 2002); Proclamation 7577 of July 17, 2002, 67 Fed. Reg. 47677 (July 19, 2002); Executive Order 13268 of July 2, 2002, 67 Fed. Reg. 44751 (July 3, 2002).

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CERTIFICATE OF COMPLIANCE

1. This brief of the appellee has been prepared using WordPerfect 9 software, Times New Roman font, 14 point proportional type size.
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Federal Public Defender

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This is to certify that a true and correct copy of the foregoing Brief of Appellee was sent via facsimile, (757) 441-6739, and by first-class mail, to Lawrence R. Leonard, Managing Assistant U.S. Attorney, at the Office of the U.S. Attorney's Office, World Trade Center, 101 West Main Street, Suite 8000, Norfolk, VA 23510, on this the 24th day of February, 2003.

Federal Public Defender