

Docket # No.08-1144

SUPREME COURT OF THE UNITED STATES,

BURHAN UDDIN AHMED,

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BRIEF FOR PETITIONERS
Team 2403

Counsel of Record, Team 2403

QUESTIONS PRESENTED:

1. Whether the Authorization for Use of Military Force, Pub. L. no. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes, and if so whether the Constitution allows, the seizure and indefinite military detention of a person lawfully residing in the United State, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activity?

2. Whether the process afforded by the district court to challenge a designation as an "enemy combatant" was sufficient under the requirements of the Fifth Amendment?

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the court below:

Burhan Uddin Ahmed; and The United States of America

TABLE OF CONTENTS

QUESTION PRESENTED.....2

PARTIES TO THE PROCEEDING.....3

TABLE OF CONTENTS.....4

TABLE OF CITED AUTHORITIES.....6

JURISDICTION.....7

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....8

STATEMENT OF THE CASE.....12

SUMMARY OF THE ARGUMENT.....14

ARGUMENT.....16

I) THE PRESIDENT THE PRESIDENT LACKS THE AUTHORITY
UNDER THE AUMF TO DESIGNATE AHMED AS AN ENEMY
COMBATANT AND TO INDEFINETLY DETAIN AHMED.....16

A) The Twelfth Circuit erred in finding the
AUMF to Grant the President the Authority
to Indefinitely Detain Ahmed.....16

B) The Twelfth Circuit erred in finding that the Constitution authorizes the President the Authority to Indefinitely Detain Ahmed
.....19

C) Conclusion.....23

II) AHMED DID NOT RECEIVE SUFFICIENT DUE PROCESS....23

A) The Murphy Declaration Offered by the Government Did Not Provide Notice of the Factual Basis of Ahmed’s “Enemy Combatant” Designation.....23

B) The District Court did not Properly Apply the Hamdi Framework.....25

C) Ahmed is Entitled to the Same or Greater Due Process Protections Afforded to Hamdi.....28

D) Conclusion.....30

TABLE OF CITED AUTHORITIES

Cases

Boumediene v. Bush

128 S. Ct. 2229 (2008).....28

Ex parte Milligan

71 U.S. 2 (1866).....17, 18, 19

Ex parte Quirin

317 U.S. 1(1942).....13, 23

Hamdi v. Rumsfeld

542 U.S. 507(2004).....13, 14, 15, 16, 17, 18, 19,
23, 24, 25, 26, 27, 28, 29, 30

Mathews v. Eldridge

424 U.S. 319 (1976).....29

Padilla v. Hanft

423 F.3d 386 (4th Cir. 2005)..13, 15, 16, 17, 23 18, 19

Youngstown Sheet & Tube Co. v. Sawyer

343 U.S. 579 (1952).....20

Wong Wing v. U.S.

163 U.S. 228 (1896).....28

Statutes

Uniting and Strengthening America by Providing Appropriate
Tools Required to Intercept and Obstruct Terrorism Act of

2001. Pub. L. No. 107-56, 115 Stat. 272 (Patriot Act)....21

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2009. The petition for a writ of certiorari was granted on October 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

i. REVELANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offence to be twice put in jeopardy in life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), as amended,

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas on September 11, 2001, act of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it 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; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title.

This joint resolution may be cited as the "Authorization for Use of Military Force."

Section 2. Authorization for Use of the United States Armed Forces.

(a) In General. That the President is authorized 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.

(b) War Powers Resolution Requirements.

(1) Specific Statutory Authorization. Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization

within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of Other Requirements. Nothing in this resolution supersedes any requirements of the War Powers Resolution.

Statement of the Case

On September 11, 2001, al Qaeda accepted responsibility for launching coordinated attacks on strategic sites in the United States. In response, the President launched a military campaign against al Qaeda and received authorization from Congress to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized committed, or aided the terrorist attacks." AUMF, 115 Stat. 224. On September 8, 2001, Burdan Uddin Ahmed (Ahmed), a Pakistan citizen, lawfully entered the United States with his family to pursue a doctor of veterinary medicine at Wilson University in Wilson, East Dakota. In light of Ahmed's designation as an "enemy combatant" by the President and his indefinite detention, Ahmed alleges he is not an enemy combatant, the President did not have the authority to designate him an enemy combatant, and he was not afforded a meaningful opportunity to challenge his status as an "enemy combatant." The government provided the court with a hearsay document, the Declaration of John R. Murphy (Murphy Declaration), which made many assertions suggesting that Ahmed was an operative of al Qaeda. The magistrate judge concluded that the Murphy Declaration provided Ahmed with sufficient notice of the factual basis for his detention

and designation as an enemy combatant and shifted the burden on Ahmed to produce more persuasive evidence. Ahmed alleges that he should not be forced to prove his own innocence, thus, the magistrates procedures were unconstitutional. Ahmed's petition for a writ of habeas corpus was dismissed on based on the recommendation of the magistrate judge and the district court. Ahmed argues he was not provided with a fair process when the district court relied on hearsay evidence and forcing him to produce evidence to prove his own innocence. After appealing the district court's decision to dismiss his petition, the Twelfth Circuit affirmed the district court's dismissal. Ahmed filed a motion for rehearing. The Twelfth Circuit voted to vacate the panel and hear the case en banc. The Twelfth Circuit held that although the president did have the authority under the AUMF to detain Ahmed as an Enemy Combatant, the district court did not afford him due process under the Fifth Amendment. We appeal and argue that the Twelfth Circuit erred in finding that Ahmed fell within the definition of an enemy combatant and that the President was authority under the AUMF to indefinitely detain Ahmed as an "enemy combatant." We affirm the Twelfth Circuit holding that the district court did not afford Ahmed a fair opportunity to rebut the charges against him.

SUMMARY OF ARGUMENT

The Twelfth Circuit's decision should be reversed because the Ahmed not properly designated by the President as an "enemy combatant" nor did not President have authority under the AUMF or the Constitution. In the alternative, the Twelfth Circuit's decision should be reversed because Ahmed was not afforded the process due to him under the Fifth Amendment.

As noted in these lines of cases, an individual is an enemy combatant when that individual affiliates during wartime with the "military arm of the enemy government." *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942); *Hamdi v. Rumsfeld* 542 U.S. 507, 519 (2004); *Padilla v. Hanft*, 423 F.3d 386, 391(4th Cir. 2005).

Furthermore, Congress also imposed strict limits in the Patriot Act on the duration of the detention of "terrorist aliens" within the United States. *Ahmed*, 39. The Patriot Act prohibits the unlimited "indefinite detention" of "terrorist aliens"; rather it requires the Attorney General either to begin "removal proceedings" or to charge the alien with a criminal offense" not later than 7 days after the commencement of such detention. *Id.*

Although Ahmed could not be properly designated as an "enemy combatant" based on the Supreme Court's definition

in *Hamdi*, *Padilla*, and *Ex parte Quirin*, the district court deprived Ahmed of a sufficient process to challenge this designation by relying on the government's hearsay evidence and by forcing Ahmed to produce evidence to prove his own innocence without the government first overcoming its burden of showing credible evidence. Further the district court did not conduct a fact-finding process but allowed the government to use hearsay evidence, the Murphy Declaration. However, the allegations in the Murphy declaration do not support the definition of an "enemy combatant" as defined in *Hamdi*.

Finally, because the risk of erroneously depriving Ahmed of his "life, liberty, and property" was greater than the burdens on the government to afford a "greater process", Ahmed was entitled to a greater process than that applied in *Hamdi*. At the very core of our Constitutional protections are the procedural safeguards required by due process that ensure the "accuracy of court proceedings" and prevent the erroneous deprivation of "the most elemental of liberty interest." *Hamdi*, 542 U.S. at 529.

The Petitioner's respectfully request the Court of Appeals' holding that the President was authorized to detain Ahmed indefinitely be reversed and to affirm the Court of Appeals' holding that Ahmed was not afforded the

process due to him under the Fifth Amendment.

ARGUMENT

I. THE PRESIDENT LACKS THE AUTHORITY UNDER THE AUMF TO DESIGNATE AHMED AS AN ENEMY COMBATANT AND TO INDEFINATELY DETAIN AHMED.

A. The Twelfth Circuit Erred in Finding the AUMF to Grant the President the Authority to Indefinitely Detain Ahmed.

The AUMF does not grant the President the authority to subject a civilian such as Ahmed to indefinite military detention, nor does the AUMF allow the President to designate a civilian such as Ahmed as an enemy combatant. Well established precedent has set up guidelines to determine whether or not a person fits within the category of an enemy combatant. Ahmed was a civilian lawfully residing in the United States, who was not a member of nor fought alongside any nation's military, had not taken up arms against the United States, and was not present in a combat zone. According to establish precedent, Ahmed does not fit into the category of an enemy combatant, thus Ahmed should be granted habeas relief.

The Twelfth Circuit Court asserts that the construction given to the AUMF in *Hamdi v. Rumsfeld* 542 U.S. 507 (2004), and *Padilla v. Hanft*, 423 F.3d 386 (4th

Cir. 2005), governs in relation to Ahmed and authorizes the President to designate Ahmed as an enemy combatant. *Ahmed* at 13. Hamdi was captured by U.S. allies in Afghanistan and turned over to our military there. *Hamdi*, 542 U.S. at 510. When it was discovered that Hamdi was a U.S. citizen by birth, he was transported to the U.S. for continued detention here. *Id.* The narrow holding of *Hamdi* applies to individuals who were "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." *Id.* at 516. The court in *Hamdi* defined "enemy combatant" as one who is "part of hostile forces" element and "engaged in armed conflicts against the United States." *Id.* at 523. The *Hamdi* plurality further indicated that the AUMF authorizes military detention of only those who sufficiently fit into the established definition of an as enemy combatant. *Id.* If an individual does not fit this definition as establish in *Hamdi*, then the individual cannot be properly designated as an enemy combatant.

Padilla v. Hanft, offers further guidance in defining what individuals fit into the category of enemy combatants. Padilla was captured at the border of the United States as he was attempting to "further prosecut[e] that war on American soil, against American citizens and targets."

Padilla, 423 F.3d at 389. *Padilla* was found to be an enemy combatant by the Fourth Circuit because he was "armed and present in a combat zone." *Id.* at 390. Furthermore, *Padilla's* detention was justified "to prevent a *combatants return to the battlefield...a fundamental incident of waging war.* *Id.* at 392.

In contrast to *Hamdi, Padilla*, in *Ex Parte Milligan*, 71 U.S. 2 (1866), the Court invalidated a Presidential Order to detain an Indiana resident during the Civil War. *Ex Parte Milligan*, 71 U.S. 2, 5 (1866). *Milligan* was alleged to have communicated with enemy Confederates, conspired to "seize munitions of war," and "join[ed] and aid[ed]...a secret" enemy organization "for purpose of overthrowing the Government and duly constituted authorities of the United States." *Id.* at 6. Although *Milligan* had committed "an enormous crime" during "a period of war" and at a place "within...the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy", the Court found no support in the "laws and usages of war" to detain *Milligan* as a combatant, instructing the government to try *Milligan* in civilian court. *Id.* at 10. *Milligan's* fundamental finding was that our Constitution does not permit the

government to subject *civilians* within the United States to military detentions. *Id.* Milligan as a non-combatant was "not subject to the law of war." *Id.* Thus, according to *Milligan*, civilians lawfully residing within the United States, even if they are "dangerous enemies, accused of enormous crimes," as part of "secret enemy organizations that want to overthrow the Government, "may not be subjected to indefinite military detention..." *Milligan*, 71 U.S. at 6.

The Twelfth Circuit plurality in *Ahmed* misapplied the holdings of *Hamdi*, and *Padilla* in our case. As noted in these lines of cases, an individual is an enemy combatant when that individual affiliates during wartime with the "military arm of the enemy government." *Hamdi*, 542 U.S. at 519; *Padilla*, 423 F.3d at 391. Ahmed was not part of any military arm or hostile forces of any government. Our case can be distinguished from the holding in *Padilla*. *Padilla* was found to be an enemy combatant by the Fourth Circuit because he was "armed and present in a combat zone." *Id.* at 390. Ahmed was arrested in Wilson, East Dakota while pursuing a doctor of veterinary medicine degree at Wilson University. Ahmed was initially arrested on charges of possession of counterfeit Social Security cards with the intent to defraud and making a false statement to the FBI.

These charges do not fit under the mantra of being armed and present in a combat zone. Furthermore, Padilla's detention was justified "to prevent a *combatant's return to the battlefield...*a fundamental incident of waging war." *Id.* at 392. In the case of Ahmed, there is no battlefield to prevent Ahmed from returning to. Ahmed was arrested in Wilson, East Dakota, not a combat zone or theatre of war. Consequently, the precedent established in Padilla cannot apply to Ahmed because he was not armed and present in a combat zone.

More fitting is the precedent established in *Ex Parte Milligan*. Al-Qaeda more closely resembles the secret Confederate enemy organization that wanted to overthrow the Government, as illustrated in *Milligan*. The organization in *Milligan* was the secret society known as the Order of American Knights or Sons of Liberty. This organization's purpose of overthrowing the Government and duly constituted authorities of the United States is similar to the purpose of Al-Qaeda. *Milligan* was accused of holding communication with the enemy and conspiring to seize munitions of war stored in the arsenals to liberate prisoners of war. While these charges are similar to the charges against Ahmed. *Id.* 71 U.S. at 6. Because Ahmed does not fit under the category of enemy combatant established

by *Hamdi*, *Quirin*, and *Padilla*, the AUMF does not grant the President the authority to designate Ahmed as an enemy combatant nor to indefinitely detain Ahmed.

B. The Twelfth Circuit erred in finding that the Constitution authorizes the President the Authority to Indefinitely Detain Ahmed

The President's power is at its' weakest because it is going against the expressed will of Congress. Through the Patriot Act, Congress established a specific method for the government to detain aliens affiliated with terrorist organizations that the government believes have come to the United States to endanger our national security, conduct espionage and sabotage, use force and violence to overthrow the governments, engage in terrorist activity, or are likely to engage in any terrorist activity. This could not match more closely the allegations against Ahmed, and it is clear that Congress intended for such individuals to be detained, but only for a limited time, and only by civilian authorities, prior to deportation or criminal prosecution.

The *Ahmed* plurality should have conducted and applied an analysis of Presidential power as illustrated by the U.S. Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in order to evaluate claims of Presidential power during wartime and peacetime. "When the

President Acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate" *Youngstown*, 343 U.S. at 635. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers...[w]hen the President takes measures incompatible with the expressed or implied will of Congress his power is at its lowest ebb. *Id.* at 637. In such cases, "Presidential claim[s]" to power "must be scrutinized with caution, for what is at stake is the equilibrium established our constitutional system. *Id.* at 638. To evaluate a constitutional claim of presidential power to detain aliens lawfully residing in the United States, the court must look to the expressed or implied will of Congress. *Ahmed*, 37.

After the AUMF was passed, Congress enacted another, more specific law that expressed its will regarding the powers granted to the President to detain "enemy aliens" in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Patriot Act). The Patriot Act grants the President broad powers to deal with "terrorist aliens." In

doing so, however, it *categorically forbids* their indefinite detention. *Id.* The statute authorizes the Attorney General to detain any alien whom he "has reasonable grounds to believe" (1) seeks to enter the United States" to "violate any law of the United States relating to espionage or sabotage" or to use "force, violence, or other unlawful means" in opposition to the government of the United States; (2) "has engaged in a terrorist activity"; or (3) is "likely to engage after entry in any terrorist activity," has "incited terrorist activity," is a "representative" or "member" of a "terrorist organization," is a "representative" of a "group that endorses or espouses terrorist activity," or "has received military-type training" from a terrorist organization. Patriot Act § 412(a); 8 U.S.C. §1182(a)(3)(A)-(B). The Patriot Act permits the Attorney General to "take into custody" any "terrorist aliens" based only on the Attorney General's "belie[fs]" as to the aliens' threat, with no process or evidentiary hearing, and judicial review available only through petition for habeas corpus. *Id.*, *Ahmed*, 39.

Furthermore, Congress also imposed strict limits in the Patriot Act on the duration of the detention of "terrorist aliens" within the United States. *Ahmed*, 39. The

Patriot Act prohibits the unlimited "indefinite detention" of "terrorist aliens"; rather it requires the Attorney General either to begin "removal proceedings" or to charge the alien with a criminal offense" not later than 7 days after the commencement of such detention. *Id.* If a terrorist alien's removal "is unlikely for the reasonably foreseeable future," he may be detained for additional periods of up to six month" if his release "will threaten the national security of the United States." *Id.*

The Twelfth Circuit's holding that the President may indefinitely detain Ahmed is clearly contrary to the express will of Congress when it passed the Patriot Act subsequent to the AUMF. Through the Patriot Act, Congress established a specific method for the government to detain aliens affiliated with terrorist organizations that the government believes have come to the United States to endanger our national security, conduct espionage and sabotage, use force and violence to overthrow the government, engage in terrorist activity, or are likely to engage in any terrorist activity. This could not match more closely the allegations against Ahmed, and it is clear that Congress intended for such individuals to be detained, but

only for a limited time, and only by civilian authorities, prior to deportation or criminal prosecution.

C. Conclusion

The Twelfth Circuit's decision should be reversed because the Ahmed not properly designated by the President as an "enemy combatant" under the definition established by *Hamdi*, *Quirin*, and *Padilla*. Further the AUMF does not grant the President the authority to designate Ahmed as an enemy combatant nor to indefinitely detain Ahmed nor did not President have authority under the AUMF or the Constitution. In the alternative, the Patriot Act expressly prohibits indefinite detention.

II. AHMED DID NOT RECEIVE SUFFICIENT PROCESS HE IS DUE UNDER THE FIFTH AMENDMENT

A. The Murphy Declaration Offered By the Government Did Not Provide Notice of the Factual Basis of Ahmed's "Enemy Combatant" Designation

The allegations contained in the Murphy Declaration do not give notice to Ahmed as to the factual basis for his classification as an "enemy combatant" because the allegations in the Murphy declaration do not support the definition of an "enemy combatant" as defined in *Hamdi*. The

Supreme Court in *Hamdi* provide the procedural requirements for a habeas proceeding in order to comport with minimal due process when challenging an "enemy combatant" designation. *Hamdi*, 542 U.S. at 533. At minimum, a detainee must receive notice of the factual basis for his classification as an "enemy combatant" and an opportunity to rebut the Government's factual assertions before a neutral decisionmaker. *Id.* According to *Hamdi*, an enemy combatant is "part of or supporting forces hostile to the United States or coalition partners" and who "engaged in an armed conflict against the United States." *Id.* at 516. Clearly, nothing in the Murphy Declaration supports an allegation that Ahmed was engaged in the armed conflict against the United States.

In *Hamdi*, the habeas petition did not provide a factual basis for the concession that Hamdi was "part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States." *Id.* at 527. The habeas petition stated that when Hamdi was seized while residing in Afghanistan. The court held that the "facts" that constitute Hamdi's designation as an "enemy combatant" were "insufficient to support Hamdi's detention." *Id.* at 526. The court stated that simply asserting that Hamdi *resided* in Afghanistan

could not support the concession that Hamdi was captured in a zone of active combat, part of the hostile forces, or engaged in an armed conflict against the United State. *Id.* at 527.

Unlike the Court in *Hamdi*, the district court did not make a further inquiry into the sufficiency of the hearsay evidence. Like Hamdi, the only evidence offered by the Government to support Ahmed's designation as an "enemy combatant" was the hearsay evidence, the Murphy declaration. The Murphy declaration asserts that Ahmed was "engaged in conduct in preparation for acts of international terrorism intended to cause injury to the United States." The declaration asserts, among other things, that Ahmed "conducted research regarding use of chemicals as weapons of mass destruction." Nothing in the record states that Ahmed actually possessed any chemicals that could be used as weapons of mass destruction. Making an active *inquiry* into the use of chemicals as weapons of mass destruction does not amount to "engaging in armed conflict." Thus, Ahmed was not given sufficient notice as to the factual basis of his designation as an enemy combatant.

B. Ahmed Was not Given the Habeas Proceedings
Under *Hamdi*

The District Court incorrectly accepted the Murphy Declaration as sufficient evidence without the Government proving that it was unable to produce non-hearsay evidence or that the relaxed evidentiary standard was necessary in light of the facts. Based on the "burden shifting scheme" set out in *Hamdi*, first, the Government has the burden of proof of providing "credible evidence" that the habeas petitioner can be classified as an enemy combatant. *Id.* at 534. Once the Government can produce "credible evidence" the burden of proof shifts to the petitioner to rebut that evidence with "more persuasive evidence." *Id.*

In *Hamdi*, the plurality acknowledged that the realities of the military context through which enemy combatant cases arise "may necessitate compromising some of the procedural requirements attendant to normal habeas proceedings." *Id.* at 531. According to *Hamdi*, hearsay may be needed as the most reliable available evidence from the Government. *Id.* By the Court chose to use the phrase "may be needed" instead of "may be used", the Court seems to emphasize the limiting exception of necessity as a factor to present hearsay evidence in a habeas proceeding. The necessity to introduce hearsay evidence is further limited by three requirements: (1) that the hearsay evidence is

constitutionally permissible, (2) the hearsay evidence is rebuttable; and (3) a fair opportunity for rebuttal is provided. *Id.* The Court has discretion to accept hearsay evidence, "so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return." *Id.* Nowhere in the record did the government allege the burden of providing "greater process" that necessitated the introduction of the Murphy Declaration.

In *Hamdi*, the petitioner was an American citizen who was captured on the battlefield in Afghanistan by allies of the United States and turned over to the custody of the American military. *Id.* at 510. The Government asserted that because Hamdi was captured on a foreign battlefield, "no factual inquiry or evidentiary hearing" would be necessary, and the military forces would "unnecessarily and dangerously distracted by litigation." *Id.* Thus, the Government introduced the Mobbs Declaration as the government's sole evidentiary support for Hamdi's detention. *Id.* In the declaration, Mobb states that Hamdi was labeled as an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." *Id.* at 512. For a further inquiry, the District Court ordered the Government to turn over numerous materials for a "meaningful judicial review," including

copies of Hamdi's statements, notes taken from interviews relating to his activities in Afghanistan, and a list of all interrogators. *Id.* at 513-14. The Supreme Court held that because of the "risk of erroneous deprivation" and the burdens imposed on the military for "additional safeguards", "neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant." *Id.* at 532. Although the court is accorded deference when balancing the factors, when relying on hearsay evidence, the Court in Hamdi suggested that the District Court "proceed with the caution that we have indicated is necessary in this setting" and "engag[e] in a factfinding process that is both prudent and incremental." *Id.* at 538-39. (emphasis added).

Like the Mobb's declaration in *Hamdi*, the government in our case introduced the Murphy declaration as their sole evidentiary support for Ahmed's designation as an "enemy combatant." However, unlike *Hamdi*, the District Court accepted the Murphy Declaration without any further factfinding. Unlike *Hamdi*, Ahmed was not on the battlefield but was at his home. In this case, most of the evidence and witnesses would not be found in a foreign country's battle

field but in the United States, thus reducing the burden of litigation on the government. Because the government did not allege any burden of providing non-hearsay evidence and District Court did not engage in a factfinding process, as recommended by the Court in *Hamdi*, Ahmed was not provided sufficient process that he is due under the Fifth Amendment.

C. Ahmed is Entitled to the Same or Greater
Due Process Protections Afforded to Hamdi

Ahmed argues that because he was arrested by federal while in the United States rather than on the "battle field" by military personnel, he is entitled to more procedural safeguards than Hamdi. "The Fifth amendment applies to all persons and extends to lawfully admitted aliens living within the US." *Wong Wing v. US*, 163 U.S. 228 (2008). Aliens receive certain protections including those rights guaranteed by the Due Process Clause "when they have come within the territory of the US and developed substantial connections" *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). Although by the terms used in the Court's holdings in *Hamdi* they were apparently limited to "citizen-detainees," the last paragraph of section III, D of the O'Connor plurality relies on the Geneva Convention and states that Habeas Corpus should be available to an

"alleged enemy combatant." *Hamdi* at 539. In *Hamdi*, Justice O'Connor used the balancing test established in *Mathews v. Eldridge*, which balances the executive's ability to execute effective military operations and an individual's "core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Ahmed was "captured" by the federal government in the United States, while he was in his home with his family. Because Ahmed was not on the battlefield but was at his home, most of the evidence and witnesses would not be found in a foreign country's battle field but right here in the United States. Thus, the military forces who are engaged in combat in Afghanistan would not be "burdened" with the task of litigation. Ahmed was only turned over to the Department of Defense for indefinite detention. Additionally, according to the Murphy declaration, the FBI, not the Department of Defense, conducted the forensic examination of Ahmed's laptop computer that allegedly contained the technical information that supported the presumption that Ahmed was supporting al Qaeda. The telephone communications made from payphones and cellular phone accounts from Wilson, East Dakota that supported the presumption that Ahmed was in contact with al Qaeda officers is evidence

that the FBI, not the military forces, would have the burden to show. Because of these facts the federal government would be faced with the heavier burden to produce documents to support the allegations in the Murphy declarations, not the military forces.

D. Conclusion

It is clear that Ahmed was not afforded the process due to him under the Fifth Amendment because hearsay evidence offered by the government did not provide notice of the factual basis of Ahmed's "enemy combatant" designation, Ahmed was not accorded the habeas proceedings proscribed by *Hamdi*. Because Ahmed was arrested while in his home in the United States, while unarmed, he should accord something close to a criminal process. Despite the ongoing fight against terrorism is ensuring both home and abroad, "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." (*Hamdi*, 532). We therefore agree with the Court of Appeals decision as it pertains to this issue.