

No. 08-11144

---

---

IN THE  
Supreme Court of the United States

---

---

**BURHAN UDDIN AHMED,**

Petitioner,

v.

**UNITED STATES OF AMERICA,**

Respondent.

---

---

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

---

**Brief for the Petitioner**

---

Team # 3206  
Counsel for the Petitioner

## QUESTIONS PRESENTED

I. 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 States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?

II. Was the lower court correct when it held that under the Fifth Amendment the petitioner was not afforded a sufficient and meaningful opportunity to challenge his designation as an enemy combatant?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	vii
JURISDICTION.....	2
APPLICABLE CONSTITUTIONAL AND STATUTORIAL PROVISIONS.....	2
STANDARD OF REVIEW.....	2
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT.....	8
<b>I. The President cannot order, under the AUMF, to seize and indefinitely detain Ahmed as an enemy combatant because he has lawfully resided in the U.S. for several months and never engaged or took up arms against U.S. forces in a battlefield.....</b>	<b>8</b>
<b>A. Hamdi and Padilla fail to support categorizing Ahmed as an enemy combatant because the Government never alleges Ahmed has engaged or took up arms against U.S. forces on a battlefield .</b>	<b>9</b>
<b>B. Ahmed’s situation mirrors this Court’s holding in Milligen because, although he may be potentially dangerous, he is still a legal U.S. citizen .....</b>	<b>10</b>
<i>1. Quirin should not be used to cover this case based on undue influence and injustice.....</i>	<i>12</i>

II. The President is neither authorized under the AUMF nor holds any inherent power under the Constitution to seize and detain Ahmed because the AUMF is silent with regards to detention and Congress' subsequent enactment of the Patriot Act specifically details procedures to detain U.S. aliens and when the President orders the detention of Ahmed the President's power is at its lowest ebb because it fails to correspond what Congress has implied ..... 14

A. Congress has neither clearly nor expressly authorized the President under the AUMF to seize and indefinitely detain lawfully residing U.S. citizens because the language of the AUMF fails to provide for detention and *Hamdi* and *Padilla* are limited to their facts and circumstances .....15

B. The enactment of the Patriot Act, subsequent to the AUMF, illustrates and implies the clear intentions of Congress to limit the President's power to seize and indefinitely detain U.S. citizens because the Patriot Act provides specific procedures and safeguards, for detaining suspected terrorist aliens legally residing in the U.S .....17

C. The Presidents power is at its lowest ebb when he seizes and indefinitely detains lawfully residing U.S. citizens because Congress did not express or imply the President has the power to do so .....19

III. Lawful aliens, including suspected terrorists, are within the scope of the constitutional protection of the Fifth Amendment right to due process. .... 21

**IV. Ahmed was not afforded sufficient process under the requirements of *Hamdi* because Ahmed did not receive adequate notice of the factual basis for his detention and designation as an enemy combatant and did not have a fair opportunity to challenge the Government's assertions before a neutral decision maker. ....22**

**A. Ahmed did not receive adequate notice of the factual basis for his detention and designation as an enemy combatant because the Government's use of the Murphy Declaration as hearsay evidence was inappropriate and inadequate.....23**

*1. Hearsay evidence may be used when exigencies demand that the requirements be tailored to suit the circumstances. ....24*

*2. The Government may not shirk its responsibility to provide more reliable and credible evidence without explanation of the burden to produce additional evidence and the basis of the reliability of the Murphy Declaration. ....25*

**B. Ahmed did not have a fair opportunity to challenge the Government's assertions before a neutral decision maker...28**

**V. Under the Mathews balancing test used in *Hamdi*, Ahmed requires different and more stringent process than *Hamdi* because the wrongful deprivation of Ahmed's right to liberty outweighs the burden on the Government to provide greater process to Ahmed. ....29**

<b>A. The potential for wrongful deprivation of Ahmed's right to liberty outweighs that of Hamdi.....</b>	<b>29</b>
<b>B. The Government's interest in protecting national security and prosecuting potential terrorists would not be offended by allowing greater process to Ahmed.....</b>	<b>31</b>
CONCLUSION.....	32
APPENDIX A.....	33
APPENDIX B.....	35
APPENDIX C.....	36
APPENDIX D.....	38
APPENDIX E.....	39
APPENDIX F.....	40

Table of Authorities

Page

**United States Supreme Court Cases:**

*Brecht v. Abrahamson*, 507 U.S. 619 (1993) . . . . . 2

*Busic v. United States*, 446 U.S. 398 (1980) . . . . . 18

*Dames & Moore v. Regan*, 453 U.S. 654 (1981) . . . . . 18

*Duncan v. Kahanamoku*, 327 U.S. 304 (1946) . . . . . 15

*Ex parte Endo*, 323 U.S. 283 (1944) . . . . . 15

*Ex parte Milligan*, 71 U.S. 2 (1866) . . . . . 11

*Ex parte Quirin*, 317 U.S. 1 (1942) . . . . . 11, 13

*Greene v. McElroy*, 360 U.S. 474 (1959) . . . . . 15

*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) . . . . . 20

*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) . . . . . *passim*

*Hink v. United States*, 550 U.S. 501 (2007) . . . . . 17

*Johnson v. Eisentrager*, 339 U.S. 763 (1950) . . . . . 18

*Marbury v. Madison*, 5 U.S. 137 (1803) . . . . . 32

*Mathews v. Eldridge*, 424 U.S. 319 (1976) . . . . . 23, 29, 31

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306  
(1950) . . . . . 23

*Palko v. State of Connecticut*, 302 U.S. 319 (1937) . . . . . 28

*Reid v. Covert*, 354 U.S. 1, 30 (1957) . . . . . 12

*Rugendorf v. United States*, 376 U.S. 528 (1964) . . . . . 24

*United States v. Robel*, 389 U.S. 25, 264 (1967) . . . . . 30

*United States v. Estate of Romani*, 523 U.S. 517, 530 (1998).. 18

*Wong Wing v. United States*, 163 U.S. 228 (1896) . . . . . 21

*Wright v. West*, 505 U.S. 277 (1992) . . . . . 2

*Youngstown Sheet and Tube*, 343 U.S. 579 (1952) . . . . .19, 20

*Zadvydas v. Davis*, 533 U.S. 678 (2001) . . . . .22

**United States Circuit Court Cases:**

*Al-Marri v. Pucciarelli*, 534 F.3d 213 (4<sup>th</sup> Cir. 2008) . . . . .

. . . . . 25, 27, 28, 29, 32

*Kaur v. Ashcroft*, 388 F.3d 734 (9<sup>th</sup> Cir. 2004) . . . . . 21

*Lopez v. United States Immigration and Naturalization Service*,

758 F.2d 1390 (10<sup>th</sup> Cir. 1985) . . . . . 21

*Equal Access to Education v. Merten*, 305 F.Supp.2d 585 (E.D.

V.A. 2004) . . . . . 21

*United States v. Walsh*, 774 F.2d 670 (4<sup>th</sup> Cir. 1985) . . . . . 26

*Padilla v. Hanft*, 423 F.3d 386, 393 (4<sup>th</sup> Cir. 2005) . . . .9, 10

*Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) . . . . .26

**United States District Court Cases:**

*American Civil Liberties Union v. National Security Agency*, 438

F. Supp. 2d 754 (S.D. Mich. 2006) . . . . . 21, 21

*Khan v. Obama*, 646 F.Supp.2d 6 (D.D.C. 2009) . . . . .25, 26, 27

*Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 290 F.Supp.2d

54 (D.D.C. 2003) . . . . .21

**Constitutional and Statutorial Provisions:**

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

Federal Rules of Evidence 807. . . . . 24

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (Patriot Act) . . . . . *passim*

U.S. Const. amend. V. . . . . 21

28 USC § 2243. . . . . 23

**Law Review Articles:**

David Cole, Out Of The Shadows: Preventive Detention, Suspected Terrorists, And War, 97 Cal. L. Rev. 693 (2009).. 25, 27, 28, 30

Stephanie Cooper Blum, The Why and How of Preventative Detention in the War on Terror, 26 T.M. Cooley L. Rev. 51 (2009) . . . . . 13, 16, 30

Jerry Mashaw, The Supreme Court's Due Process Calculus for Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28 (1976) . . . . . 22

**Other Sources:**

Pierce O'Donnell, *In Time of War: Hitler's Terrorist Attack on America* (The New Press 2005) . . . . . 13

---

No. 08-11144

---

In The  
Supreme Court of the United States

---

---

---

**BURHAN UDDIN AHMED,**

Petitioner,

v.

**UNITED STATES OF AMERICA,**

Respondent.

---

---

---

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

---

**Brief for the Petitioner**

---

Team # 3206  
Counsel for the Petitioner

---

## JURISDICTION

A statement of jurisdiction is omitted under rule 2(c).

## APPLICABLE CONSTITUTIONAL AND STATUTORIAL PROVISIONS

Relevant provisions are located in the Appendix.

## STANDARD OF REVIEW

The Court reviews habeas corpus proceedings de novo. *Brecht v. Abrahamson*, 507 U.S. 619, 642 (1993). De novo means that the Court takes a fresh look at the “mixed questions of law and fact” and will render decisions without giving deference to the lower courts’ holdings. *Brecht*, at 642; *Wright v. West*, 505 U.S. 277, 299–300 (1992). The purpose of taking the record in its entirety is to review all possible errors and to ensure that the questions of law and fact are properly decided. *Brecht*, at 642.

## STATEMENT OF THE CASE

Burhan Uddin Ahmed (Ahmed) has been in custody for almost seven years now and has yet to be heard in court regarding the crimes and terrorist acts of which he is accused. Ahmed has been incorrectly designated as an enemy combatant and detained under the pretense of authority by the Executive, and has not been able to meaningfully contest that designation.

## Statement of the Facts

On September 11<sup>th</sup>, 2001, the al Qaeda terrorist network coordinated an attack that resulted in the destruction of

several prominent targets in the United States. (R. at 6.) A week after the attacks, Congress passed the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF).<sup>1</sup> The AUMF is a resolution which gives the President the power 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, Ahmed, along with his family, lawfully came to the United States from Pakistan to seek a veterinary medicine degree in East Dakota. (R. at 7.) Four months after entering the United States and beginning school, Ahmed was arrested as a material witness in the government’s investigation of the attacks on September 11, 2001. (R. at 7.) Ahmed was held for nine months and eventually charged in November 2002 with the possession of counterfeit Social Security cards with the intent to defraud. (R. at 7.) In January 2003, Ahmed was also charged with making a false statement to the Federal Bureau of Investigation (FBI). (R. at 7.) Ahmed pled not guilty to all charges and had a trial date set for July 17, 2003, more than ten months after his initial arrest. (R. at 7.)

Prior to the pre-trial meeting set for June 15, 2003, the

---

<sup>1</sup> A copy of the relevant portions of the AUMF is attached as Appendix A.

government filed an ex parte motion to dismiss the indictment based on an order from the President. (R at 7.) The order stated the following: Ahmed (1) is an enemy combatant; (2) is closely associated with al Qaeda; (3) "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism"; (4) "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda"; and (5) "represents a continuing, present, and grave danger to the national security of the United States." (R. at 7.) The President stated that the detention of Ahmed was necessary to keep him from further aiding al Qaeda. (R. at 7.)

Ahmed was thus handed over to the Secretary of Defense to be detained as an enemy combatant after the district court granted the Government's motion to dismiss. (R. at 7.) For almost six years now, Ahmed has been in military custody in the Army Regional Consolidated Detention Facility in Souda, East Dakota, and has been given no indication as to when his detention will end. (R. at 8.)

#### Statement of the Proceedings Below

Soon after his transfer to the Detention Facility, Ahmed filed a petition for a writ of habeas corpus with the United States District Court for the District of East Dakota to challenge his military detention as an "enemy combatant." (R. at 8.) The district court found that Ahmed was constitutionally

entitled to challenge his designation as an enemy combatant consistent with his procedural due process rights. (R. at 9.) The court said that Ahmed had a right to notice of the factual basis of his detention, and that if the Government could produce evidence supporting Ahmed's designation as an enemy combatant, then the onus shifts to Ahmed to refute the designation with more persuasive evidence. (R. at 9.) If Ahmed could rebut the presumption of the evidence provided by the Government, the Government could then offer his release or a full adversarial hearing with greater procedural safeguards. (R. at 9.)

As evidence of Ahmed's designation as an enemy combatant, the Government submitted the Declaration of John R. Murphy, (Murphy Declaration), outlining Ahmed's involvement with al Qaeda.<sup>2</sup> (R. at 8.) The Murphy Declaration stated that Ahmed was a sleeper agent (R. at 8) who had been trained in terrorist training camp in Afghanistan. (R. at 9.) It also stated that he had communicated with Osama Bin Laden and other prominent al Qaeda members, he entered the United States with the intent of committing terrorist acts, and he possessed highly valuable intelligence about al Qaeda. (R. at 9.) The district court concluded that the Murphy Declaration provided sufficient notice to Ahmed of the factual basis for his detention and the burden

---

<sup>2</sup> A copy of the declaration is attached as Appendix F.

then shifted to him to refute his designation as an enemy combatant. (R. at 9.) Ahmed responded with a general denial but did not offer any specific evidence rebutting the Murphy Declaration. (R. at 9.) The district court dismissed Ahmed's petition based on the lack of rebuttal evidence. (R. at 10.) A panel of the United States Court of Appeals for the Twelfth Circuit affirmed. (R. at 10.) Ahmed filed a motion for rehearing, and the court voted to vacate the panel opinion and hear the case en banc. (R. at 10.)

On appeal, the court held that the AUMF did authorize the President's detention of Ahmed as an enemy combatant, but Ahmed was not afforded sufficient process to challenge his designation as an enemy combatant. (R. at 6.) Both the Government and Ahmed appealed and the two issues before this court are as follows: (1) the authorization to detain Ahmed based on his designation as an enemy combatant, and (2) the sufficiency of the process afforded him in filing his petition for a writ of habeas corpus.

#### SUMMARY OF THE ARGUMENT

The President wrongfully categorized Ahmed as an enemy combatant. Ahmed, although arguably a dangerous enemy, never took up arms or engaged U.S. forces on any battlefield. Ahmed is a lawfully residing U.S. citizen and should be treated as such.

The Government maintains that the President is authorized by the AUMF to indefinitely detain Ahmed. However, Congress has neither expressed nor implied this extreme power to the President under the AUMF. The AUMF was specifically made silent with regards to detention and with the subsequent enactment of the Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Patriot Act), this implies the President does not have the authority to indefinitely detain lawfully residing U.S. citizens because of the specific detailed procedures and safeguards provided by the Patriot Act.<sup>3</sup> Furthermore, the Constitution grants the President no such power because when the President detains U.S. citizens indefinitely he is violating the Patriot Act, which is Congress's intentions and as such the President's power is at its lowest ebb.

As a lawful alien, Ahmed is within the scope of the constitutional protections of the Fifth Amendment. Even though he is a suspected terrorist, this Court has held that his rights are nonetheless valid. The Government has attempted to withdraw the procedural safeguards that would ensure that Ahmed was lawfully captured and rightfully detained. Ahmed should be afforded process that, at a minimum, would give him notice of

---

<sup>3</sup> Patriot Act is attached as Appendix C.

the factual basis for his detention and designation as an enemy combatant, and a fair opportunity to challenge the government's assertions before a neutral decision-maker. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

The magistrate judge has allowed the Government to submit hearsay evidence, with no supporting evidence or explanation for the lack of other evidence, and as a result the burden has fallen on Ahmed to prove his innocence. While hearsay evidence may be used, this is not a situation where the Government has shown the lack of other evidence, the burden to obtain other evidence, or the reliability of the hearsay provided. This process does not provide Ahmed with adequate notice of the factual basis for his detention and subsequently the ability to fairly refute the accusations. Under the Mathews balancing test that was used in *Hamdi*, Ahmed's interest in his right to due process and the potential for wrongful deprivation of his right to liberty outweigh the burden on the government to increase the process due him. The Government's interest in protecting national security and prosecuting potential terrorists should not prevent Ahmed the process due him.

#### ARGUMENT

- I. The President cannot order, under the AUMF, to seize and indefinitely detain Ahmed as an enemy combatant because he has lawfully resided in the**

**U.S. for several months and never engaged or took up arms against U.S. forces in a battlefield.**

In response to the September 11 attacks Congress enacted the AUMF. (R. at 6.) This Court held in *Hamdi*, that the President is authorized under the AUMF to indefinitely detain certain terrorists labeled enemy combatants. *Hamdi*, 524 U.S. at 507. The Government alleges that Ahmed is an enemy combatant. (R. at 7.) However, because Ahmed never took up arms, or engaged U.S. forces on a battlefield and because he is a lawfully residing U.S. citizen, the government's allegations have no merit.

**A. *Hamdi* and *Padilla* fail to support categorizing Ahmed as an enemy combatant because the Government never alleges Ahmed has engaged or took up arms against U.S. forces on a battlefield.**

The President wrongfully categorized Ahmed as an enemy combatant because he does not fall into the "limited category" of people covered by the "narrow circumstances" of *Hamdi* and *Padilla*. *Padilla v. Hanft*, 423 F.3d 386, 393 (4th Cir. 2005). (quoting *Hamdi*, 524 U.S. at 516-17.)

In *Hamdi*, this Court defined "enemy combatant" those individuals who are, "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." *Hamdi*, 524 U.S. at 516. And because Hamdi affiliated with a Taliban military unit and subsequently engaged U.S. forces only

to end up surrendering himself and his rifle this Court justifies labeling Hamdi as an enemy combatant. *Id.* at 510.

Subsequently, the Fourth Circuit, relying on *Hamdi*, held the President is authorized to detain a U.S. citizen captured on U.S. soil, as an enemy combatant because he was previously, "armed and present in a combat zone" fighting the U.S. with Taliban forces in Afghanistan. *Padilla*, 423 F.3d at 390-91.

When applying the "limited category" and "narrow circumstances" addressed in *Padilla* and *Hamdi*, categorizing Ahmed as an enemy combatant is an injustice. Unlike Hamdi and Padilla, the Government never alleges Ahmed "took up arms" or engaged with forces on any battlefield against the U.S. The only similarity is to Padilla because Ahmed was captured on U.S. soil. However, Ahmed has been legally residing in the U.S. for several months and was detained in the confines of his home. (R. at 7.) Padilla, on the other hand, was immediately captured upon his arrival to the U.S. at a Chicago airport. *Id.* at 388.

Therefore, based on the holdings in *Hamdi* and *Padilla*, Ahmed cannot be categorized as an enemy combatant because he was never present or took up arms on a battle field supporting forces against the U.S.

**B. Ahmed's situation mirrors this Court's holding in *Milligen* because, although he may be potentially dangerous, he is still a legal U.S. citizen.**

Ahmed cannot be categorized as an enemy combatant because the Government cannot distinguish the facts and circumstances from this Courts ruling in *Milligan*. In *Milligan*, despite the Governments allegations connecting him to a "secret" organization to overthrow the government while, "within . . . the theatre of military operations," during the Civil War this Court concluded, although he is a "dangerous enemy" he still remains a civilian. *Ex parte Milligan*, 71 U.S. 2, 121-22 (1866). This Court could not categorize Milligan as an enemy combatant because he was a U.S. citizen living in Indiana for several years and never affiliated himself directly with a state or rebellion forces participating in the Civil War. *Id.* at 131.

Thereafter, this Court distinguished the petitioners in *Ex parte Quirin*, 317 U.S. 1 (1942) from *Milligan*. Evidence supports petitioners in *Quirin* as enemy combatants because they were directed, paid and outfitted by the German army during World War II to infiltrate and destroy U.S. war facilities. *Id.* at 46. This Court held "Citizens 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 [combatants]. . ." *Id.* at 37-38.

This Court distinguished *Hamdi*, and hypothetically reexamined *Milligan* and stated that "[h]ad Milligan been captured while he was assisting confederate soldiers by carrying

a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522. Unlike *Hamdi* and *Padilla*, the Government cannot distinguish Ahmed from *Milligen*. Like *Milligen*, the Government's allegations suggest Ahmed was affiliated with a "secret" organization to essentially "overthrow the government." However, Ahmed, like *Milligen*, has been lawfully residing as a U.S. citizen and as such should be treated as one.

Thus, this Court's holding in *Milligen* should apply to Ahmed because although he is allegedly dangerous, he is still a U.S. citizen legally residing within our borders.

1. *Quirin* should not be used to cover this case based on undue influence and injustice.

The circumstances and attacks over the years destroy and undermine the credibility of *Quirin* and thus should not be applied to a case involving a legally residing U.S. citizen. Justices Scalia and Stevens, dissenting in *Hamdi*, held that *Quirin* was, "not this Court's finest hour." *Hamdi*, 542 U.S. at 569. Unlike *Quirin*, its enemy combatant supporting counterpart *Milligen* has been praised by the Supreme Court throughout the years as, "one of the great landmarks in this Court's history." *Reid v. Covert*, 354 U.S. 1, 30 (1957).

Investigation by researchers over the years determined that President Roosevelt unduly influenced the Supreme Court at the

time. One researcher's investigation revealed that President Roosevelt informed the Court that he would use his presidential authority against the petitioners in *Quirin* despite the outcome of the Court's decision. See Pierce O'Donnell, *In Time of War: Hitler's Terrorist Attack on America* (The New Press 2005).

Additional to the President's undue influence over the Court, it was found that the proceedings were rapid and unfair evidenced by a limited opinion. The justices failed to read the briefs before the trial, relied on hearsay evidence and determined the petitioners fait in less than one day. O'Donnell, *supra*, at 213.

Additionally, the petitioners in *Quirin* never actually challenged their status as enemy combatants unlike Hamdi, Padilla and Ahmed. *Quirin*, 487 F.3d at 38-39, 46. As one scholar points out, "an understanding of the underlying facts demonstrated that Ex parte *Quirin* is largely inapposite and not analogous to the current enemy-combatant cases." Stephanie C. Blum, The Why and How of Preventive Detention in the War on Terror, 26 T.M. Cooley L. Rev. 51, 93 (2009).

Because of several consistent attacks throughout the years, *Quirin* should be inapplicable to this case. We urge this Court today to reexamine the circumstances and undue influences upon the Court in *Quirin*. And in doing so acknowledge that if the Court at the time had not been unduly influenced by the

President, issued an opinion, disregarded hearsay evidence, read briefs prior to the hearing and took less than a day to decide the life or death of petitioners the holding in *Quirin* may very well be different.

**II. The President is neither authorized under the AUMF nor holds any inherent power under the Constitution to seize and detain Ahmed because the AUMF is silent with regards to detention and Congress' subsequent enactment of the Patriot Act specifically details procedures to detain U.S. aliens and when the President orders the detention of Ahmed the President's power is at its lowest ebb because it fails to correspond what Congress has implied.**

The Government first claims that the President is authorized under the AUMF to indefinitely detain lawfully residing U.S. citizens falls short for two reasons. First, if Congress intended the President such a broad authority they would have clearly expressed such intentions. Second, Congress' subsequent enactment of the Patriot Act implies their intentions that the AUMF does not authorize the President to detain U.S. citizens.<sup>4</sup>

The Government's second claim is that the President has inherent Constitutional power to detain U.S. citizens. This falls short as well because when Congress enacted the Patriot

---

<sup>4</sup> Relevant portions of the Patriot Act are attached at Appendix C.

Act, any orders by the President to detain U.S. citizens is an act under his lowest ebb of presidential power.

**A. Congress has neither clearly nor expressly authorized the President under the AUMF to seize and indefinitely detain lawfully residing U.S. citizens because the language of the AUMF fails to provide for detention and *Hamdi* and *Padilla* are limited to their facts and circumstances.**

If Congress intended to offer the President the power to indefinitely detain legally residing U.S. citizens under the AUMF they would have expressly authorized this power. This Court rejected the Government's argument in *Ex parte Endo*, 323 U.S. 283, 300 (1944) that the President has implied powers under a wartime statute to detain a citizen of Japanese heritage because, "the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language [Congress] used." See also *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (holding, "without explicit authorization from either the President or Congress the defendants were not empowered to deprive" a government employee of his position.). *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding that Congress, in enacting a federal statute, did not authorize civilians to be subject to military trials because Congress could not have intended, "to exceed the boundaries between military and civilian power, in which our people have always believed.").

Additionally, evidence through legislative history infers Congress did not intend such an authority under the AUMF. During a debate in the U.S. Senate, officials lobbied to have the words "in the United States" included *after* the provision "use all necessary and appropriate force." And since this phrase was not included into the AUMF, "it can be inferred that Congress did not intend for the President to use his war powers within the confines of the U.S." Blum, *supra*, at 107.

The *Hamdi* decision is limited to its facts and makes it clear that the President, "only has legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant." *Hamdi*, 542 U.S. at 523. Despite, this Court's reasoning to prevent *Hamdi* to return to the battlefield as a "fundamental incident of waging war" this Court further concluded that, "it is of no moment that the AUMF does not use specific language of detention." *Id.* at 519.

It is one thing to authorize the President to detain the enemy (similar to *Hamdi* and *Padilla*) when the enemy is holding a gun to our soldiers head. It is another thing to allow the President to order an individual, peacefully and lawfully residing here in his home in America, to be removed from his home away from his family and stripped of all other liberties the U.S. offers and then be indefinitely detained for the

remainder of the war on terror. This is clearly an abuse of power and not what Congress intended.

Therefore, Congress neither expressed nor implied under the AUMF to authorize the President to seize and detain U.S. citizens because the AUMF is silent with regards to detention and *Hamdi* and *Padilla* are limited to their facts.

**B. The enactment of the Patriot Act, subsequent to the AUMF, illustrates and implies the clear intentions of Congress to limit the President's power to seize and indefinitely detain U.S. citizens because the Patriot Act provides specific procedures and safeguards, for detaining suspected terrorist aliens legally residing in the U.S.**

When Congress enacted the Patriot Act, they specifically and procedurally detailed exactly how to deal with Ahmed and other legally residing U.S. citizens suspected of terrorism. For example, section § 412(a) of the Patriot Act only allows detention for seven days and prohibits indefinite detention. If the Attorney General wishes to extend beyond the seven days the Attorney General must follow specific detailed procedures provided in the text of the Patriot Act.

As a general rule a statute subsequently enacted by Congress that is specific and narrowly tailored takes precedence over a statute previously enacted by Congress that is broad and general. See *Hink v. United States*, 550 U.S. 501, 506 (2007) (clarifying that, "a precisely drawn, detailed statute" normally "pre-empts more general remedies" ought to be "regarded as

exclusive"). *Busic v. United States*, 446 U.S. 398, 406 (1980) (holding that, "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence"). *United States v. Estate of Romani*, 523 U.S. 517, 530 (1998) (illustrating how a more "specific policy" in a subsequent federal statute "should control our construction" of a previous federal statute).

Moreover, this Court has declined to translate broad legislative statutes in a way that would clash with other statutes passed by the same legislature. See *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

The AUMF is a broadly interpreted federal statute. The holding in *Hamdi* reiterates this fact when the court noted "it [was] of no moment that the AUMF does not use specific language of detention. . ." *Hamdi*, 542 U.S. at 519. On the other hand, the Patriot Act, a federal statute subsequently enacted by Congress thirty-eight days after the AUMF explicitly provides guidelines and safeguards for the Attorney General on how to deal with U.S. alien citizens.

As Justice Jackson wrote, "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of right as he increases his identity with our society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). Ahmed is originally a citizen of Pakistan,

and is now a U.S. alien legally residing with his family for several months within the borders of the U.S. Ahmed has been suspected of terrorist associations however, never took up arms, joined hostile forces or was ever present in a country while that country was engaged in battle against the U.S.

Therefore, since Ahmed is a legally residing alien any suspicion of him being engaged in terrorism is subject to the Patriot act and its express narrow language detailing the procedures and safeguards that should apply.

**C. The President's power is at its lowest ebb when he seizes and indefinitely detains lawfully residing U.S. citizens because Congress did not express or imply the President has the power to do so.**

Neither the Constitution nor Congress express or imply that the President has an inherent ability to militarily seize and indefinitely detain Ahmed. The Government claims the President's Constitutional "war-making powers" granted under Article II, allow him to detain lawfully residing U.S. citizens. (R. at 8.) In order to determine if the President is afforded such power an examination of the "frame work" coined by Justice Jackson in *Youngstown* is appropriate. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Justice Jackson concurring opinion in *Youngstown* explained "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. . ."

*Id.* at 635 Furthermore “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority. . .” *Id.* at 637. And “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” *Id.*

In *Youngstown*, this Court disallowed President Truman’s executive order to seize domestic steel-production facilities during the Korean War. *Id.* at 588-89.

The Government’s claim infers that the President’s power acting under the AUMF is at its zenith, the highest zone of power. However, the Government ignores Congress’s subsequent act of enacting the Patriot Act which specifically details the exclusive means for dealing with U.S. aliens suspected of terrorism. The President may not prefer this result but this does not give him the right to “disregard limitations” that Congress intended to have “placed on his powers.” *Hamdan v. Rumsfeld*, 548 U.S. 547, 593 n.23 (2006).

In 2006 a district court was presented with the issue as to whether the AUMF constitutionally allowed the President to use a secret program that intercepts communications within the U.S. *American Civil Liberties Union v. National Security Agency*, 438 F. Supp. 2d 754, 758 (S.D. Mich. 2006). The court held that

because the AUMF is silent with regards to surveillance and because an additional statute (FISA) enacted by Congress illustrates, "the exclusive means by which electronic surveillance may be conducted," "[t]he presidential power . . . was exercised at its lowest ebb and cannot be sustained." *Id.* at 778-79.

The AUMF is silent and the Constitution fails to inherently grant the President such a power, because if it did the President can indefinitely detain any U.S. citizen merely suspected of terrorism. In fear of this enormously broad power, Congress's enactment of the Patriot Act explicitly detailed specific procedures and safeguards in detaining individuals similar to Ahmed.

Therefore, when the President detains U.S. citizens or aliens residing lawfully in our borders he is violating a legislative act and as such falls into *Youngstown's* lowest ebb of power.

### **III. Lawful aliens, including suspected terrorists, are within the scope of the constitutional protection of the Fifth Amendment right to due process.**

The provisions of due process apply to any person "within the territorial jurisdiction" of the United States. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). The use of the word *person* in the Fifth Amendment is "broad enough to include any and every human being within the jurisdiction of the republic."

*Wong Wing*, 163 U.S. at 242. This Court has upheld this principle in spite of the unlawful presence of the alien, criminal accusations regarding their activities, and their status in the country. See *Kaur v. Ashcroft*, 388 F.3d 734 (9<sup>th</sup> Cir. 2004); *Lopez v. United States Immigration and Naturalization Service*, 758 F.2d 1390 (10<sup>th</sup> Cir. 1985); *Equal Access to Education v. Merten*, 305 F.Supp.2d 585 (E.D. V.A. 2004). Even terrorists are entitled to constitutional protection. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F.Supp.2d 54, 58 (D.D.C. 2003).

**IV. Ahmed was not afforded sufficient process under the requirements of *Hamdi* because Ahmed did not receive adequate notice of the factual basis for his detention and designation as an enemy combatant and did not have a fair opportunity to challenge the Government's assertions before a neutral decision maker.**

The Executive cannot unilaterally incarcerate or detain an individual without a timely proceeding before an independent tribunal to assure that the reasons for detention are grounded on a factual basis and legally warranted. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). This due process is not simply about making sure that there is consistency in practice; the procedures are implemented to ensure consistency in the substance of the rights that are protected and are "evaluated in terms of their capacity to prevent errors." Jerry Mashaw, The

Supreme Court's Due Process Calculus for Adjudication in  
Mathews v. Eldridge: Three Factors in Search of a Theory of  
Value, 44 U. Chi. L. Rev. 28, 46 (1976).

Normal habeas proceedings are governed by 28 U.S.C. § 2243 and the subsequent provisions.<sup>5</sup> These provisions, however, were modified by this Court in *Hamdi* for situations involving individuals labeled enemy combatants. *Hamdi*, 542 U.S. at 507. *Hamdi* required that suspected enemy combatants be given (1) notice of the factual basis for the detention, and (2) a fair opportunity to challenge the Government's assertions before a neutral decision maker. *Hamdi*, 542 U.S. at 507.

**A. Ahmed did not receive adequate notice of the factual basis for his detention and designation as an enemy combatant because the Government's use of the Murphy Declaration as hearsay evidence was inappropriate and inadequate.**

Adequate notice of the factual basis for detention has not been defined universally for all situations. Due process is "flexible" and requires different standards for different situations. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). However, the general standard for notice requires a good faith effort to be "reasonably calculated under the circumstances to apprise the interested parties" of the claim. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950).

---

<sup>5</sup> 28 U.S.C. § 2243 is attached at Appendix E.

1. *Hearsay evidence may be used when exigencies demand that the requirements be tailored to suit the circumstances.*

The Federal Rules of Evidence allow the use of hearsay evidence in trial “if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.” Fed. R. Evid. 807.<sup>6</sup> The use of the Murphy Declaration in this case is allowable in federal court if and only if it complies with the rules.

Additionally, this Court stated in *Hamdi* that hearsay evidence may in fact have to be “accepted as the most reliable available evidence” that the Government can provide in that proceeding when it is necessary to alleviate the burden on the Government in ongoing military conflict. *Hamdi*, 542 U.S. at 533. An affidavit from a confidential source, for example, may be considered reliable enough to provide the basis for a search warrant “so long as there was a substantial basis for crediting the hearsay.” *Rugendorf v. United States*, 376 U.S. 528, 533 (1964). If reliable, the hearsay evidence may then be used as

---

<sup>6</sup> Federal Rules of Evidence 807 is attached at Appendix B.

the basis to create a rebuttable presumption of guilt of the accused as long as there is a fair opportunity to rebut it.

*Hamdi*, 542 U.S. at 534.

2. *The Government may not shirk its responsibility to provide more reliable and credible evidence without explanation of the burden to produce additional evidence and the basis of the reliability of the Murphy Declaration.*

Hearsay is only sufficient after measuring the burden on the Government to produce additional evidence and provide greater process, and if the full protections “prove unworkable and inappropriate in the enemy combat setting.” *Hamdi*, 542 U.S. at 535. Hearsay evidence “may not always be the most reliable available evidence” and if that is the case, “should not be accepted where more reliable evidence is available.” *Al-Marri v. Pucciarelli*, 534 F.3d 213, 271 (4<sup>th</sup> Cir. 2008). “Where there is no need to rely on hearsay, it should not be permitted, as it directly undermines the individual's opportunity to cross-examine his accusers.” David Cole, Out Of The Shadows: Preventive Detention, Suspected Terrorists, And War, 97 Cal. L. Rev. 693 (2009). If the Government does not provide supporting evidence or reasoning, or “only does so in a way that nonetheless precludes a court from assessing the reliability of the evidence-- then the evidence cannot be relied upon to

justify detention." *Khan v. Obama*, 646 F.Supp.2d 6, 12 (D.D.C. 2009).

The key difference between the use of hearsay evidence in *Hamdi* and the case at bar is the availability of that additional evidence. The evidence of Hamdi's capture was most likely outside of the reach of the tribunal. The evidence of Ahmed's domestic investigation and arrest is located domestically. The Fourth Circuit instructively found that statements, even those made by Government officials, cannot replace witness testimony in reliability. *United States v. Walsh*, 774 F.2d 670, 671 (4<sup>th</sup> Cir. 1985). The Government cannot expect mere statements to carry the weight of actual witness testimony unless the court is satisfied that it is the best evidence available, it is reliable, and the burden on the Government to obtain additional evidence would be too great.

In *Parhat v. Gates*, the District of Columbia Circuit Court of Appeals found that the Government had not satisfied the showing of their need to submit hearsay evidence sufficient to sustain the determination of the accused as an enemy combatant. *Parhat v. Gates*, 532 F.3d 834, 847 (D.C. Cir. 2008). Without any explanation as to the absence of non-hearsay evidence to the sources of the document, the court in *Parhat* "could not... assess the reliability of the assertions in the documents." *Parhat*, 532 F.3d at 847. Relying on *Parhat*, the court recently found the

Government's evidence yet again insufficient based on their lack of "enough information to permit assessment" of the factors in the document. *Khan*, 646 F.Supp.2d at 15.

If there is more reliable evidence that the Government has available, and the evidence could be used without endangering any other confidential or classified information of the Government, "due process would require the Government to produce it." *Cole*, *supra* 693. The court in *Al-Marri* remanded the case and placed the onus on the Government to show that "the normal due process protections available to all within this country are impractical or unduly burdensome . . . and that the hearsay declaration that constitutes the Government's only evidence . . . is 'the most reliable available evidence' supporting the Government's allegations." *Al-Marri*, 534 F.3d at 218.

The Government has not provided any reason for using only the Murphy Declaration as evidence of Ahmed's guilt, and has not given any information about the credibility of the document itself. Nor has there been consideration of the value of any additional procedural safeguards or the inability of the Government to obtain more reliable evidence. *Hamdi*, 542 U.S. at 529. The Murphy Declaration is a mere two page document that states the accusations against Ahmed. (R. at 47-8.) None of the information is corroborated by other sources and it includes statements that make inferences without legitimate reasoning.

Without this supporting information, or at least an explanation as to why that information is missing, the declaration is substantially flawed and does not constitute adequate notice of the factual basis for Ahmed's detention.

**B. Ahmed did not have a fair opportunity to challenge the Government's assertions before a neutral decision maker.**

The only way a review or rebuttal of the information is meaningful is if Ahmed would be able to have access to the real data and sources that are implicating his guilt, and to confront the actual witness and evidence. *Al-Marri*, 534 F.3d at 273. Ahmed did not reply with any specific rebuttal to the assertions made by the Government regarding his designation as an enemy combatant. (R. at 9.) Instead, Ahmed made a general denial, and stated that he was not being afforded a fair opportunity to challenge the court's presumption of his guilt. (R. at 9.) "[T]he failure to provide the detainee with sufficient information deprives him of a meaningful opportunity to respond." *Cole*, *supra* 693. In order to have a fair opportunity to defend himself, and to avoid the trial being a "sham or pretense," Ahmed must have adequate information regarding the factual basis for his detention and the ability to fairly refute the evidence proffered. *Palko v. State of Connecticut*, 302 U.S. 319, 327 (1937).

The lower court not only allowed the burden to shift to Ahmed to produce “more persuasive evidence,” but even if Ahmed did meet that burden, he would not automatically gain relief. (R. at 9.) The Government would then have a chance to release Ahmed or participate in a full blown adversarial hearing. (R. at 9.) The court in *Al-Marri* noted the same discrepancy and determined it was a factor that made the process afforded Al-Marri unfair. *Al-Marri*, 534 F.3d at 266. If there is not a need to rely on the hearsay document, which shields the actual sources and witnesses of the information from attack, then it should not be allowed as sufficient or as providing a real opportunity for Ahmed to refute his classification as an enemy combatant.

**V. Under the Mathews balancing test used in *Hamdi*, Ahmed requires different and more stringent process than *Hamdi* because the wrongful deprivation of Ahmed’s right to liberty outweighs the burden on the Government to provide greater process to Ahmed.**

**A. The potential for wrongful deprivation of Ahmed’s right to liberty outweighs that of *Hamdi*.**

This Court established a balancing test in *Mathews v. Eldridge* that balances the following: (1) the importance of the claimant’s interest; (2) the likelihood of wrongful deprivation under procedures used and if additional procedures would reduce the risk; and (3) the importance of the Government interest and the burden of additional procedure. *Mathews*, 424 U.S. at 319.

The importance of Ahmed's interest in being liberated from a physical imprisonment by the Government is "the most elemental of liberty interests." *Hamdi*, 542 U.S. at 529. This Court recognized that right in *Hamdi*, and the case at bar bears even graver consequences if the Government is allowed to detain individuals in this way.

Ahmed was captured while in his home, not on the battle field engaging in terrorist behaviors like Hamdi. (R. at 7.) The possibility of wrongful deprivation of the right to liberty is must greater for Ahmed than it was for Hamdi. Notwithstanding the possibility of the long term detention *after* he was labeled an enemy combatant, Ahmed was held for a full nine months before he was even formally charged. (R. at 7.) As one author stated: "[T]he visibility of release errors and the invisibility of erroneous detentions will lead judges to err on the side of custody over liberty." Cole, *supra* at 693. Our country's present state of fear of terrorism exacerbates this likelihood of erroneous detentions. However, it would shameful if "we would sanction the subversion of one of those liberties. . . which makes the defense of the Nation worthwhile." *United States v Robel*, 389 U.S. 258, 264 (1967).

Interestingly enough, after this Court remanded Hamdi's case, Hamdi was taken to Saudi Arabia and released from United States custody "without any kind of adversarial hearing and

stated that he no longer posed a threat to the U.S." Blum, at 51. If Hamdi, who was captured on the battlefield, was not found to be a true enemy combatant when the Government was asked to provide adequate process, it is even more likely that the Government may make a similar mistake when capturing individuals from their homes in the United States.

**B. The Government's interest in protecting national security and prosecuting potential terrorists would not be offended by allowing greater process to Ahmed.**

In light of Ahmed's interests, the court must assess the value of the additional evidence in light of the right being violated and the additional burden on the Government to produce that evidence. *Mathews*, 424 U.S. at 335. The Government's interest is in "detaining those who actually pose an immediate threat to the national security of the United States." *Hamdi*, 542 U.S. at 530. The Executive asserts that "it has been determined that Ahmed represents a continuing grave threat to the United States." (R. at 48.) However, the Government never explained how or why allowing Ahmed sufficient evidence to support the factual basis regarding his designation as an enemy combatant, or a fair opportunity to be heard, would harm national security. All that the Government has stated is that since this Court found in *Hamdi* that hearsay evidence the most available reliable source of information, then Ahmed is doomed

to bear the burden of the presumption of guilt based only on a two page statement from the Executive. Allowing greater process to Ahmed would not require digging up evidence covered "in the rubble of war," but rather nearby and available. *Hamdi*, 542 U.S. at 531-2. If the Government is so sure that Ahmed is a clear threat, then let that evidence be held up to the scrutiny of the judicial branch that has been entrusted with deciding "what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803). An individual taken from his home while legally residing in the United States should be afforded at least an explanation for the evidence used against him, and a fair balancing of his interests against the Government.

#### CONCLUSION

For the forgoing reasons, we ask this Court to reverse the 12<sup>th</sup> Circuit Court of Appeals holding that Ahmed was properly detained and affirm the holding that Ahmed has a right to additional process regarding his status as an enemy combatant.

## APPENDIX A

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

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, acts 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 requirement of the War Powers Resolution.

Approved September 18, 2001.

APPENDIX B

**Federal Rules of Evidence 807**

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

## APPENDIX C

### **Patriot Act provisions**

#### SEC. 412. MANDATORY DETENTION OF SUSPECTED TERRORISTS.

(1) CUSTODY: The Attorney General shall take into custody any alien who is certified under paragraph (3)

(2) RELEASE: Except as provided in paragraphs (5) and (6), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (6), such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

(3) CERTIFICATION: The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien (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 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); see also 8 U.S.C. § 1227(a)(4)(A)(i), (a)(4)(A)(iii), (a)(4)(B); or "(B) is engaged in any other activity that endangers the national security of the United States.

(4) NONDELEGATION.--The Attorney General may delegate the authority provided under paragraph (3) only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

(5) COMMENCEMENT OF PROCEEDINGS.--The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense,

not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

(6) LIMITATION ON INDEFINITE DETENTION.--An alien detained solely under paragraph (1) who has not been removed under section 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

(c) REPORTS.--Not later than 6 months after the date of the enactment of this Act, and every 6 months thereafter, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, with respect to the reporting period, on--

- (1) the number of aliens certified under section 236A(a)(3) of the Immigration and Nationality Act, as added by subsection (a);
- (2) the grounds for such certifications;
- (3) the nationalities of the aliens so certified;
- (4) the length of the detention for each alien so certified; and
- (5) the number of aliens so certified who--
  - (A) were granted any form of relief from removal;
  - (B) were removed;
  - (C) the Attorney General has determined are no longer aliens who may be so certified; or
  - (D) were released from detention.

APPENDIX D

**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; nor shall any person be subject for the same offence to be twice put in jeopardy of 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.

APPENDIX E

**28 U.S.C. § 2243**

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

## APPENDIX F

### **Declaration of John R. Murphy Director, Joint Intelligence Task Force for Combating Terrorism**

1. I, John R. Murphy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

#### **Preamble**

2. I submit this Declaration for the Court's consideration in the matter of Ahmed v. United States, pending in the United States District Court for the District of East Dakota.

3. Based on the information that I have acquired in the course of my official duties, I am familiar with all the matters discussed in this Declaration, and all of the information regarding Burhan Uddin Ahmed gathered by the Federal Bureau of Investigation (FBI) and by personnel of the Department of Defense (DoD) once the DoD took custody of Ahmed after he was declared an enemy combatant by the President of the United States.

#### **Declaration of Ahmed as an Enemy Combatant**

4. The President of the United States declared Ahmed an enemy combatant on June 13, 2003. The President made this determination based on intelligence gathered and analyzed through the cooperation of several Executive Branch agencies.

#### **Ahmed's Background and Training**

5. Ahmed is a Pakistani citizen.

6. Ahmed attended an al Qaeda-run terrorist training camp in Afghanistan for 18 months between 1996 and 1998. He was trained in the use of poisons.

7. In Afghanistan, Ahmed cultivated relationships with senior al Qaeda leaders, including Osama Bin Laden and Khalid Sheikh Muhammad.

8. Ahmed legally entered the United States with his family on September 8, 2001. He was ostensibly in the United States to pursue a doctorate in veterinary medicine at Wilson University in Wilson, East Dakota. When he was arrested by the FBI in January 2002, he was in failing status at the university due to his consistent absenteeism.

#### **Ahmed's al Qaeda Activities**

9. Ahmed was commissioned by al Qaeda to enter the United States as a sleeper agent. While in Afghanistan Ahmed met personally

with Osama Bin Laden. Ahmed volunteered to be an al Qaeda martyr or to do whatever else was asked of him. He was sent to the United States to establish cover as a sleeper agent. 10. In the United States, Ahmed received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator of 9/11.

11. Ahmed acted as a contact point for al Qaeda operatives newly arriving in the United States. In addition, Ahmed was instructed to investigate the plausibility of hacking into the main-frame computer systems of the Social Security Administration with the objectives of creating chaos in the United States's social safety net and securing revenue for future terrorist attacks through Social Security fraud.

#### **Analysis of Laptop Computer**

12. The FBI conducted a forensic examination of Ahmed's laptop computer. The investigation revealed that Ahmed was conducting research regarding use of chemicals as weapons of mass destruction.

13. The highly technical information found on Ahmed's laptop far exceed the interest of a merely curious individual, and rather is consistent with the documented interests of al-Qaeda and other terrorist groups.

14. Ahmed's laptop also contained several computer programs typically utilized by computer hackers, and bookmarked websites devoted to computer hacking.

15. In addition, the laptop analysis revealed computer files containing Arabic lectures by Bin Laden and his associates on the importance of jihad and martyrdom, and the merits of the Taliban regime in Afghanistan.

#### **Telephone Communications**

16. After September 11, 2001, calling cards and cellular phone accounts attributed to Ahmed were used to attempt to contact a high-ranking al Qaeda officer known to be residing in the United Arab Emirates. Calls to the same number were made by several pay phones in the Wilson, East Dakota, area.

#### **Social Security Card Theft**

17. In Ahmed's laptop carrying case, a handwritten list of Social Security numbers and the names of their holders. All of the approximately 40 cards were issued to persons other than Ahmed.

18. During the forensic examination of Ahmed's computer, evidence of efforts to sell Social Security numbers was discovered.

### **Conclusion**

19. In conclusion, this joint investigation has turned up sufficient evidence to determine that Ahmed was an active al Qaeda agent at the time he entered the United States. After entering the country, he engaged in conduct in preparation for acts of international terrorism intended to cause injury to the United States. Ahmed's status has been carefully and thoroughly reviewed, and it has been determined that Ahmed represents a continuing grave threat to the United States. Ahmed must be detained to prevent him from aiding al Qaeda in its efforts to attack and harm the United States.

JOHN R. MURPHY

Director, Joint Intelligence Task Force for Combating Terrorism  
Executed on 15 August 2004 in Washington, D.C.