

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 PETITIONER

TEAM 3549

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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. 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?

STATEMENT OF JURISDICTION

The Court granted certiorari on October 2, 2009. Detainees are entitled to proceed with habeas challenges under procedures crafted to account for the special circumstances of wartime detention. *Boumediene v. Bush*, S.Ct 2229 (2008). Jurisdiction is proper under federal habeas statute 28 U.S.C. § 2241, 28 U.S.C. §1331, 28 U.S.C. 2201, and 28 U.S.C. 2202 as well as Articles One and Three of the United States Constitution. Filing of notice was timely and in accordance with the rules.

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STATEMENT

Petitioner Burhan Uddin Ahmed came to the United States to pursue a doctor of veterinary medicine at Wilson University in Wilson, East Dakota. R. 7. Along with his family, he lawfully entered the United States on September 8, 2001, and took up residence in Wilson. *Id.* Ahmed was arrested on January 3, 2002, in connection with the investigation of the 9/11 attacks. *Id.*

Eleven months elapsed before Ahmed was charged with possession of counterfeit Social Security cards with the intent to defraud. *Id.* He later was also charged with making false statements to the FBI. *Id.* Ahmed pleaded not guilty to all charges and filed a motion to suppress evidence he claimed was obtained through torture. *Id.* Only two days before a hearing on all pretrial motions, the government filed a motion to dismiss the indictment based on an order signed by the President of the United States. *Id.* The President had determined that Ahmed was an enemy combatant, an agent of al Qaeda, and was preparing a terrorist attack in the United States. *Id.* The President ordered the military detention of Ahmed who was taken to an army detention facility in Souds, East Dakota. R. 8. Ahmed has been detained by the military without charge or trial. *Id.*

Ahmed filed a petition for a writ of habeas corpus in district court. R. 8. To justify Ahmed's detention, the government provided the court with a hearsay document. R. 8.

SUMMARY OF ARGUMENT

Ahmed has been detained by the military for over six years without ever being tried for a crime. The only evidence that is the basis of his detention is a multiple-hearsay document written by a government bureaucrat. Based on the inadequate process afforded Ahmed by the district court to challenge the legality of his detention, the Court must conclude that Ahmed's continued detention violates the Due Process Clause, the Federal Rules of Evidence, and the requirements of the habeas corpus statute.

The President has exceeded his statutory and constitutional authority in detaining Ahmed as an "enemy combatant" under the Authorization for Use of Military Force. Ahmed was not captured on the battlefield and has not participated in any hostile act against the United States. *See Hamdi v. Rumsfeld*, 548 U.S. 557, 573 (2006). The Patriot Act supersedes the Authorization for Use of Military Force and lacks the requisite *clear statement* needed to authorize the Executive to detain Ahmed. *Busic v. United States*, 446 U.S. 386, 406 (1980).

ARGUMENT

I. THE CONSTITUTION OF THE UNITED STATES AND THE AUTHORIZATION FOR USE OF MILITARY FORCE ("AUMF") DO NOT AUTHORIZE THE UNITED STATES GOVERNMENT TO SEIZE AND INDEFINITELY DETAIN AN INDIVIDUAL LAWFULLY RESIDING IN THE UNITED STATES WITHOUT A CRIMINAL CHARGE OR TRIAL BASED ON ALLEGATIONS THAT THE DETAINEE CONSPIRED WITH AL QAEDA TO ENGAGE IN TERRORIST ACTIVITIES.

The Executive did not have statutory or constitutional authority to detain Ahmed. The president lacks the authority to detain Ahmed as an "enemy combatant" under the AUMF because Ahmed was not a member of al Qaeda, and did not participate in any hostile acts against the United States. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004). In *Hamdi*, the Court determined that an alleged enemy combatant captured on the battlefield in Afghanistan, who was also a United States citizen, was entitled to due process rights. Here, Ahmed's case is distinguished from Yaser Hamdi's case because Ahmed, a lawful resident of the United States, was not captured on the battlefield. Moreover, Ahmed was not engaged in any terrorist activity. Ahmed's classification as an enemy combatant is unfounded and he is entitled to due process rights. Thus, Ahmed must be charged immediately or released.

A. THE AUMF DOES NOT GRANT THE PRESIDENT AUTHORITY TO DETAIN AHMED AS AN "ENEMY COMBATANT."

The AUMF does not grant the president power to indefinitely detain individuals arrested within the United States as "enemy

combatants.” Under the AUMF, 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.” Pub. L. No. 107-40, 115 Stat. 224 § 2(a) (2001). Congress must grant the president authorization to arrest and detain a lawful resident within the United States. *Brown v. United States*, 12 U.S. 110, 122 (1814). Further, the authorization must be in the form of a “clear statement” expressly authorizing such action, despite a formal declaration of war. *Id.* at 127. The requirement for such authorization is codified in 50 U.S.C. §21-24 (2006) and evident in various cases arising from the Cold War and Japanese Internment. *See e.g., Schneck v. United States*, 249 U.S. 47 (1919); *Korematsu v. United States*, 323 U.S. 214 (1944).

The application of the clear statement rule is of heightened importance when detention is indefinite. *Zadvydas v. Davis*, 533 U.S. 678 (2001). Upon the passage of the AUMF, Congress knew the perpetrators of the terrorist attacks on September 11th, 2001, lawfully resided in the United States. *Al Marri v. Pucciarelli*, 534 F.3d 213, 241 (4th Cir. 2008). The pilots of the hijacked planes had visas to legally enter the

United States and were former students of a flight school in Florida. *Id.* Congress chose, however, not to apply the clear statement rule to persons lawfully residing in the United States who were involved in terrorist activities. Accordingly, if Congress wanted to provide for indefinite detention for such individuals, it had the opportunity to do so. Therefore, it follows that Congress did not intend to allow the indefinite detention of individuals lawfully residing in the United States who were arrested within the United States for their involvement in terrorist activities.

The president's detention of Ahmed is not a necessary or appropriate action. The Government claims that national security demands indefinite detention of all individuals whose activities support terrorism within the United States. *Id.* It argues that given the unique nature of today's conflict (one in which the traditional markers of war do not exist), it should not held to the same standard found in traditional practices of war. *Id.* In its declaration that this conflict does not conform to a traditional war, the Government assumes the authority inherent in declaring war while refusing to adhere to any limitations on its power that accompany a traditional war. In doing this, it wrongly justifies the indefinite detention of prisoners and

denial of due process rights as necessary and proper to protect national security.

According to the record, Ahmed did not act in any manner to justify his indefinite detention or denial of his due process right to inquire into the lawfulness of his detention. Some members of al Qaeda and the Taliban, who were also detained indefinitely in Guantanamo, were actually captured on the battlefield. While they should arguably be allowed access to the courts to challenge their detention, their situation more closely resembles one in which their arrest was a necessary and appropriate measure.

Ahmed's circumstances differ from those in *Hamdan v. Rumsfeld*. In *Hamdan*, the petitioner was captured on the battlefield in Afghanistan and transported to Guantanamo Bay. 548 U.S. 557, 573 (2006). There, Hamdan was appointed a lawyer and formally charged for conspiring to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. *Id.* The Court held that the recently constructed military commissions, intended by the Bush Administration to try Guantanamo detainees, "lack[ed] the power to proceed since their structures and procedures violate[d] both the Uniform Code of Military Justice and Article Three of the Geneva Conventions."

Id. Common Article Three of the Geneva Conventions states that there are minimum rules of war that apply to armed conflicts contained within the boundaries of a single country, including the right to freedom from unlawful deportation, transfer, or confinement. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug.12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The deprivation of the right to a fair trial and the unlawful confinement of a prisoner or civilian are listed as grave breaches under the Conventions. *Id.* The Geneva Conventions apply to all cases of international conflict where at least one of the warring nations have ratified the Conventions. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug.12, 1949, 6 U.S.T. 3315, 75 U.N.T.S. 135.

Under the decision in *Hamdan* and the Geneva Conventions, Ahmed should be either released from detention or formally charged. Since Ahmed did not participate in any hostile or terrorist acts toward the United States and only allegedly associated with al Qaeda members, as opposed to being a member of the actual organization, his indefinite detention is not a necessary or appropriate action. Ahmed, like Hamdan, should at the least be afforded an opportunity to view the evidence against him and submit it for judicial review to determine

whether the detention is lawful. *Ex Parte Quirin*, 317 U.S. 1 (1942).

B. AHMED DOES NOT FALL INTO THE CATEGORY OF AN "ENEMY COMBATANT."

The circumstances of Ahmed's arrest do not support the designation of Ahmed as an "enemy combatant." An enemy combatant is a "member of the regular armed forces of a nation or state who engages in hostilities against the United States and whose belligerency is privileged as long as he adheres to the law of war." *Id.* at 31. Under the AUMF the president only has authorization to detain those persons who qualify as "enemy combatants." *Al Marri*, 534 F.3d at 225. Classification of a detainee is not valid where the grounds for such classification are not disclosed and the detainee is not afforded a Combatant Status Review Tribunal. Detainee Treatment Act of 2005, §1005(e)(2)(c)(i).

In *Hamdi*, the Supreme Court addressed the issue of detaining US citizens who were enemy combatants. 542 U.S 516 (2004). Yaser Hamdi, was a United States citizen who was captured on the battlefield in Afghanistan by the Afghan Northern Alliance and turned over the United States forces. *Id.* at 513. He was held in Guantanamo Bay until the discovery of

his United States citizenship. *Id.* The military subsequently brought Hamdi to Norfolk Virginia for hearings, appointed him counsel, and allowed him to file a petition for habeas corpus. *Id.* The Supreme Court narrowly tailored its decision to the question of whether or not an enemy combatant captured on the battlefield while engaged in a hostile act could be detained. *Id.* at 534. The Court found the AUMF authorized Hamdi's detention based on "longstanding law of war principles" that provide for detention and capture of an enemy combatant on the battlefield. *Id.*

In the instant case, the evidence proffered by the government does not establish that petitioner is an "enemy combatant" whom the president is authorized to detain under the AUMF. He is not an admitted member of the regular armed forces of a nation or state and there is no evidence that he engaged in hostilities against the United States. The record also fails to show proof of any hostile acts committed by Ahmed against the United States. The declaration provided by Murphy suggests that Ahmed may have been doing research on certain chemicals that could be used for terrorist activities. There is no proof, however, that he participated in such activity that could classify him as an "enemy combatant."

The Court found that "a challenge to the President's authority to detain is, in essence, a challenge to the department's definition of enemy combatant." *Boumediene v. Bush*, 128 S.Ct. 2229, 2276 (2008). Boumediene was a Bosnian citizen who was detained under the Military Commissions Act in Guantanamo and challenged the constitutionality of the Act and his detention. *Id.* The Court in *Boumediene* specified that it made no attempt to anticipate all of the evidentiary and access-to-counsel issues or any other remaining questions that are within the expertise and competence of the District Court to address. *Id.* The Supreme Court in *Hamdi* also did not make a final pronouncement on the outer bounds of the "enemy combatant" category, but rather decided that "the permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them." *Hamdi*, 542 U.S. at 522, n.1.

In *Hamdi*, the court relied on the "longstanding law of war principles" to interpret the AUMF and held that international laws of war are helpful to courts when identifying a general set of war powers to which the AUMF speaks. Under the Geneva Conventions, an enemy combatant must meet a two prong test; they must self identify as a member of the armed forces of that nation by wearing a uniform or by some other identifying characteristic and they must participate in the command

structure of a party to the conflict. See Bradley and Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2114 (2005). If the executive cannot prove that Ahmed meets both criteria of the test then he must be designated as a civilian. *Id.*

As stated above, Ahmed has never worn a uniform of any nation nor displayed any other self-identifying characteristic that would distinguish himself as a member of foreign armed forces. The Government fails to provide proof of the second prong of the test as Ahmed's association with al Qaeda members does not amount to his being a part of the command structure of al Qaeda. Without such proof, Ahmed cannot be classified as an enemy combatant under International Law and is therefore entitled to civilian status.

C. THE PATRIOT ACT SUPERSEDES THE AUMF AND PROHIBITS AHMED'S DETENTION

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (hereafter "Patriot Act") was enacted after the AUMF and therefore supersedes AUMF's authority on the subject of detention of suspected terrorists. 8 U.S.C. §1226A(a) (2006). Under prior Court precedent, a statute enacted subsequently

which contains more specific language regulating the subject matter in question should correctly be regarded as the appropriate authority on the matter. *Busic v. United States*, 446 U.S. 386, 406 (1980). In regards to illegal detention, the president's power in a certain area "is at its lowest ebb," when Congress creates a law since "he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952). Applying this standard to the case at bar, the Patriot Act's specific language regarding the detention of aliens who have been captured within the United States supersedes the authority granted in the AUMF, which allows "the president to use all necessary and proper force". *Al Marri*, 534 F.3d 241 (2008).

The Patriot Act became law in October 2001 and was intended to expand law enforcement's powers in the wake of the September 11th, 2001 attacks. 8 U.S.C. §1226A(a). In contrast to the AUMF, which is silent on the detention of asserted alien terrorists captured and held within the United States, the Patriot Act provides the executive with broad powers to deal with "terrorist aliens" but explicitly prohibits their indefinite detention. Under the Patriot Act, the President may detain any alien in the United States whom "he has reasonable grounds to believe has

engaged, is engaging in, or plans to engage in terrorist activity, is associated with a terrorist organization, or is engaged in any other activity that endangers the national security of the United States". *Id.* A person detained under this provision must then be charged within seven days of their arrest. *Id.* §1226A (a)(5).

Although there is no evidence in the record to support such a finding, the respondent will argue that Ahmed is suspected of terrorist activity and can therefore be detained by the executive despite being a resident alien. However, even if such were true, Ahmed cannot be indefinitely detained under the Patriot Act and should have been charged within seven days of his arrest in a civilian court.

As discussed in the above section, the Executive must have a clear statement from congress authorizing the detention of any person without charge. Congress does not make such statement in the Patriot Act, and it is clear that it considered the implications of doing since it expressly prohibited such action. Ahmed's indefinite detention directly violates Congress's intent in enacting the Patriot Act and the president has therefore exceeded his authority by continuing to hold Ahmed without charging him.

D. THE EXECUTIVE'S INDEFINITE DETENTION OF AHMED IS IN VIOLATION OF THE UNITED STATES CONSTITUTION

Even if authorized by the AUMF, Ahmed's detention violates the Constitution. All persons in the United States, citizens or non-citizens alike, are protected by the Constitution, including the rights secured by the Fourth, Fifth, and Sixth Amendments. *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2681-82 (2006). There is a fundamental right to be charged and tried in a criminal proceeding if detained within the United States. U.S. CONST. amend. V.

In *Ex Parte Milligan*, a case where a US resident was accused of war like acts and sentenced to death by a military tribunal, the Supreme Court held that it was unconstitutional to deny Milligan the right to a civilian court and that he could not be denied due process without there being an "actual and present necessity" for doing so. *Ex. Parte Milligan*, 71 U.S. 2 (1866). This holding was affirmed in *Hamdi* when the Court distinguished *Milligan* from other detention cases by explaining that *Milligan* was "not subject to military authority because he was neither captured amid combat on a battlefield nor a member of the armed forces of the enemy subject to detention as a prisoner of war". *Hamdi*, 542 U.S. at 522.

This holding should be extended to the case at bar since, like *Milligan*, Ahmed was not captured on the battlefield nor subject to detention as a prisoner of war. Ahmed has maintained his innocence and the Government has not provided direct evidence that he is a member of al Qaeda. Respondent will argue that, in this day of technological advancement, the battlefield is extended beyond the physical terrain on which armed forces are engaged. However, sustaining this tenuous argument should be rejected because it would constitute a complete disregard to the protections afforded by the Constitution if extended to US soil.

In *Ex Parte Quirin*, a case discussing the constitutionality of trying in a military court a US citizen accused of unlawful belligerency, the Supreme Court held that it was within the military's jurisdiction to try Quirin since his acts fell within the boundaries of offenses "against the law of war which the Constitution authorizes to be tried by military commission." *Ex Parte Quirin*, 317 U.S. 1, 20 (1942). The court clarified this decision from the one in *Milligan* by stating that Quirin, unlike Milligan, had once worn the uniform of an enemy nation and was therefore an admitted combatant. *Id.* at 35.

Unlike *Quirin*, Ahmed has never worn the uniform of an enemy nation and has not admitted that he is or has ever been a part

of, or supporting, a force which is hostile to the United States or engaged in an armed conflict against the United States. Also unlike Quirin, Ahmed has not even been charged or tried in a military court. Therefore he should be should be charged and given a trial immediately or released.

II. THE HABEAS PROCEEDINGS OF THE DISTRICT COURT WERE CONSTITUTIONALLY DEFICIENT

Ahmed has been detained by the military for over six years without ever being criminally charged based solely on a multiple hearsay document. Based on the inadequate process afforded Ahmed by the district court, the Court must conclude that Ahmed's continued detention violates the Due Process Clause, the Federal Rules of Evidence, and the requirements of the habeas corpus statute.

A. THE DUE PROCESS CLAUSE GUARANTEES AHMED'S RIGHT TO STRONG PROCEDURAL SAFEGUARDS BEFORE HE IS DEPRIVED OF HIS LIBERTY

Ahmed's detention violates his right to due process because it is based solely on a hearsay document.

The Due Process Clause of the Fifth Amendment applies to all persons and the Supreme Court has long held that it extends to aliens living in the United States. U.S. CONST. amend. V; *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). An alien acquires the rights guaranteed by the Constitution when he

lawfully enters and takes up residence in the United States.

Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n. 5 (1953).

Aliens are entitled to constitutional protections when they have developed substantial connections with the United States.

United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

The Due Process Clause prohibits detention by the government unless it is done as a result of a criminal proceeding with adequate procedural protections or in narrow nonpunitive circumstances. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

Where detention serves a nonpunitive purpose, there must be a special justification supporting the detention. *Id.*

Like the petitioner in *Wong Wing*, Ahmed is entitled to due process of law before he is deprived of his liberty. In *Verdugo-Urquidez*, the Court rejected the claim that the Fourth Amendment extended to a citizen and resident of Mexico who was captured and taken to the United States. 494 U.S. at 274-275. The Court emphasized that Verdugo-Urquidez had no "voluntary attachment to the United States." *Id.* at 275. Ahmed on the other hand was a legal resident of East Dakota where he had lived for four months at the time of his arrest. R. 7. Ahmed clearly established substantial and voluntary connections with the United States thereby becoming entitled to the protections guaranteed by the Fifth Amendment.

Ahmed should have been given strong procedural protections because the detention of enemy combatants is nonpunitive. See *Hamdi*, 542 U.S. at 518. Thus, to comport with the Due Process Clause, Ahmed's detention must be supported by a special justification. See *Zadvydas*, 533 U.S. at 690. Although the government may contend that preventing enemy combatants from returning to the battlefield is a sufficient justification, Ahmed's detention was still improperly affected. *Zadvydas* explained that preventive detention based on dangerousness must be subject to strong procedural protections. *Id.* For example, in *United States v. Salerno*, the Court upheld pretrial detention because it prevented danger to the community, was subject to stringent time limitations, and the arrestee was entitled to a prompt detention hearing. 481 U.S. 739, 747, 750 (1987). In contrast, the district court deemed hearsay evidence sufficient to require Ahmed to produce more persuasive evidence that he was not an enemy combatant. This falls short of the many procedural safeguards the Court took into consideration when upholding pretrial detention in *Salerno*.

Indeed, Ahmed's detention is not subject to any time limitation. In *Hamdi*, the Court explained that the current conflict against al Qaeda is unlikely to end with a formal cease-fire agreement. 542 U.S. at 520. Thus, Ahmed may be

facing lifetime detention without being afforded an adversarial hearing. The magistrate judge erroneously determined that a full adversarial hearing was warranted only if Ahmed could produce more persuasive evidence than the hearsay document presented by the government. R. 9.

B. THE DISTRICT COURT MISAPPLIED HAMDI AND DENIED AHMED DUE PROCESS

i. The district court erred when it held that a hearsay document was sufficient to support Ahmed's designation as an enemy combatant

The use of hearsay evidence was inappropriate because Ahmed was captured on US soil and not on the open battlefield.

The Suspension Clause dictates that Congress can suspend the writ of habeas corpus only in the event of rebellion or invasion. U.S. CONST. art. I, § 9, cl. 2. No one here claims that Congress has suspended the writ. The writ of habeas corpus is available to anyone detained in the United States. *Hamdi*, 542 U.S. at 525; *Zadvydas*, 533 U.S. at 699. Congress did not specifically define the procedures of habeas corpus actions; the habeas statute provides only a "skeletal outline." *Hamdi*, 542 U.S. at 525. Lower courts have some discretion in determining what process is due in enemy combatant cases. *Hamdi*, 542 U.S. at 533, 535; *Boumediene*, 128 S.Ct. at 2276. However, a person detained as an enemy combatant must receive at a minimum notice

of the factual basis of his classification and a fair opportunity to rebut the Government's assertions before a neutral decision maker. *Hamdi*, 542 U.S. at 533. Proceedings may be "tailored" to avoid imposing an excessive burden on the Executive in a time of war. *Hamdi*, 542 U.S. at 533. See also *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The district court should have required the government to demonstrate why a hearsay document was the most reliable available evidence for the designation of Ahmed as an enemy combatant. Although the process afforded to Ahmed meets the procedural minima defined in *Hamdi*, the burden shifting scheme and the credible evidence standard were inappropriate given the circumstances. *Hamdi* stressed that proceedings in enemy combatant cases may be tailored according to the available evidence and to the specific circumstances of the case. 542 U.S. at 533. See also *Boumediene*, 128 S.Ct. at 2276. Although *Hamdi* suggested that "hearsay may need to be accepted as the most reliable available evidence from the Government," it did not categorically rule that hearsay evidence must be deemed sufficient in all enemy combatant cases. *Id.* In fact, *Hamdi* specified that hearsay evidence was satisfactory only when it was the "most reliable available evidence." *Id.* at 534. Here, the magistrate judge made no factual findings as to the

availability of other reliable evidence that supported the petitioner's designation as an enemy combatant. Hamdi was captured on the battlefield by our allies who subsequently turned him over to US custody. *Hamdi*, 542 U.S. 513. Ahmed, on the other hand, was captured on US soil in East Dakota. R.7. Murphy declared that he was familiar with the circumstances surrounding Ahmed's arrest including the information gathered by the Federal Bureau of Investigation ("FBI") and the Department of Defense ("DoD"), that Ahmed had received training in Afghanistan, and that he had entered the United States as an al Qaeda sleeper agent. R. 47. The magistrate judge should have considered whether there was better evidence available which could be procured and produced through reasonable efforts.

To require the production of the information supporting Ahmed's detention does not constitute an excessive burden on the government. Since discovery into the evidence was likely to result in a "futile search for evidence buried under the rubble of war," the Court in *Hamdi* posited that an affidavit may be sufficient. *Id.* at 513, 532. That is not the case here because the evidence surrounding Ahmed's capture is not "buried under the rubble of war" but rather lies on the desks and in the hard drives of the FBI and the DoD. The Government's interest in protecting the methods and sources of intelligence gathering is

unavailing. The Court can accommodate this interest by using well-established procedural rules such as in camera review or discovery of evidence under seal.

Moreover, the magistrate judge misinterpreted *Hamdi* when he ruled that an affidavit constituted sufficient evidence to obligate Ahmed to provide more persuasive evidence that he was not an enemy combatant. By shifting the burden, the magistrate judge required the petitioner to prove his own innocence. R. 9. The burden shifting scheme described in *Hamdi* and relied upon by the magistrate judge was contemplated as a solution to the potentially excessive burdens on the Executive associated with the process afforded to criminal defendants. *Hamdi*, 542 U.S. at 533. The scheme was designed to avoid the practical difficulties that would accompany litigation "half a world away" and any negative effects on the military's prosecution of the war. 542 U.S. at 532, 535. Such difficulties are non-existent here and therefore the burden-shifting scheme described in *Hamdi* is devoid of its underlying rationale. Whereas the Court in *Hamdi* noted that other procedures were unlikely to have additional value, 542 U.S. at 534, discovery into the information gathered by the FBI and the DoD certainly will ensure that Ahmed's designation as an enemy combatant was warranted. Ahmed was not captured in the theater of war or in a

foreign country but rather on US soil after the Executive had collected extensive information about him. The presentation of evidence more persuasive than the Murphy declaration is unlikely to interfere in any substantial manner in the prosecution of the war against al Qaeda.

ii. The district court misapplied the *Mathews* balancing test

The process provided by the district court does not comport with the principles developed in *Mathews* because the risk of depriving Ahmed of his liberty was unacceptably high.

Under *Mathews*, courts must weigh the private interest that will be affected by the official action against the Government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Additionally, the balancing of these interests requires an analysis of the "risk of erroneous deprivation of the private interest if the process were reduced and the probable value, if any, of additional or substitute procedural safeguards." *Id.* In *Hamdi*, the Court applied *Mathews* and recognized that both sides presented substantial interests. 542 U.S. at 529. On the one hand, the risk of erroneous deprivation of the petitioner's liberty was "very real," while on the other, the government had a great interest in preventing enemy combatants from resuming hostilities against the United States. *Id.* at 530-531.

Additional procedures would safeguard the petitioner's constitutional right of due process. The interests at issue here are similar to those present in *Hamdi*. However, the crucial difference affecting the balancing of the interests is that Ahmed was not captured on the battlefield but in his home in the United States. The Court in *Hamdi* rejected the petitioner's contention that he was entitled to a process similar to that which accompanies a criminal trial because additional or substitute safeguards had limited probable value and because they presented great burdens on the military. *Id.* at 532-533. Unlike *Hamdi*, additional procedural safeguards here have a high value especially in light of the limited burden they would impose on the military. Additional procedures would afford the petitioner the opportunity to examine the information collected about him as well as to cross-examine the witnesses whose opinions or findings were the basis for his designation as an enemy combatant. Since Ahmed was arrested in the United States, such procedures would not subject the government to excessive burdens.

Further, an enemy combatant classification simply based on hearsay evidence constituted an excessively high risk of erroneously depriving Ahmed of his liberty. The magistrate judge deemed the presentation of mere credible evidence to be

sufficient to shift the burden of proof to Ahmed. In *Mathews*, the Court noted that although the erroneous deprivation of disability benefits was likely to constitute a significant hardship, Eldridge could have recourse to other sources of temporary income. 424 U.S. at 319. Unlike Eldridge, Ahmed does not have access to temporary alternatives if he is erroneously deprived of his liberty. The habeas action is his last resort for challenging the legality of his detention. Moreover, *Mathews* noted that the evidence which formed the basis of the termination of Eldridge's disability benefits was sufficiently reliable since it included information derived from medical sources, the recipient had full access to the information relied upon by the state agency and the opportunity to directly challenge its accuracy. *Id.* at 345-346. Here, Ahmed has access only to a hearsay document prepared by a government bureaucrat. In his declaration, Murphy asserts that Ahmed maintained extensive contacts with and received funding and instructions from al Qaeda leaders. R. 47. Murphy further maintains that Ahmed was conducting research on the use of chemicals as weapons of mass destruction. R. 48. Based on these allegations, Murphy concluded that Ahmed's graduate studies were a subterfuge and that in reality he was an al Qaeda agent who was preparing acts of international terrorism. R. 47. Unlike Eldridge, Ahmed was

not given the opportunity to review and refute the basis of Murphy's declaration nor even access to that information. Hence, Ahmed was not provided a meaningful opportunity to challenge the basis of his detention.

C. THE FEDERAL RULES OF EVIDENCE PROHIBIT RELIANCE ON THE MURPHY DECLARATION

The Murphy declaration should not have been deemed sufficiently probative of enemy combatancy. The habeas statute indicates that evidence may be taken by deposition, affidavit, or interrogatories. 28 U.S.C. § 2246 (2009). The Federal Rules of Evidence (the "Rules") are applicable in habeas actions to the extent that matters of evidence are not provided in the habeas statute. FED. R. EVID. 1101(e). Importantly, the Rules prohibit the use of hearsay in court except in narrow circumstances. FED. R. EVID. 802-805. Under the "residual exception," a statement is not excluded by the hearsay rule if, amongst other conditions, it is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." FED. R. EVID. 807.

The district court should not have permitted the government to rely on hearsay evidence without a factual determination that the use of such evidence was warranted. The habeas statute merely provides that affidavits *may* be taken into evidence. 28 U.S.C. § 2246. Likewise, in *Hamdi* the Court said that hearsay

evidence "may need to be accepted as the most reliable available evidence from the Government" in a habeas proceeding. 542 U.S. at 533. However, this conclusion was applicable to a limited circumstance; the Court explained that violating the hearsay rule was permissible only if regular proceedings excessively burdened the Executive. *Id.* Because Ahmed was apprehended in the United States, the application of regular evidentiary proceedings does not excessively burden the Executive nor present significant practical obstacles. Unlike *Hamdi*, Ahmed did not take up arms against the United States on the battlefield, amongst enemy soldiers, and thousands of miles away from the United States. Rather, he was a civilian who had lawfully entered the United States and who was surrounded by millions of other civilians when he was arrested. The hearsay rule was designed specifically to avert the unreliability of evidence such as the Murphy declaration. The residual exception is not applicable because the Murphy declaration is not the most probative evidence that the Government can procure through reasonable effort. The government can easily require Murphy to testify and produce the bases of his declaration in court. Ahmed should have been given the chance to examine the information collected by the information which established his links with al Qaeda and his preparation of a terrorist attack.

Only then will Ahmed be afforded a meaningful opportunity to rebut the factual grounds for his designation as an enemy combatant.

D. AHMED IS ENTITLED TO PROCEDURAL SAFEGUARDS SUBSTANTIALLY SIMILAR TO THOSE AFFORDED TO CRIMINAL DEFENDANTS

The district court should have required a high standard of proof because Ahmed may spend the remainder of his life in detention. When indefinite detention is at stake, strong procedural protections must be applied. *Zadvydas*, 533 U.S. at 690; *see Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (upholding indefinite civil commitment of sex predators convicted under a beyond-reasonable-doubt standard). The required standard of proof is determined by the degree of confidence society thinks the fact finder should have in the correctness of the factual conclusion for a particular type of adjudication. *In re Winship*, 397 U.S. 358, 370 (1970).

The district court should have made the determination of enemy combatancy under a beyond-a-reasonable-doubt standard of proof. In *Boumediene*, the Court broadly indicated that the writ of habeas corpus entitles the detainee to a meaningful opportunity to challenge the legality of his detention. 128 S.Ct. at 2266. Given the circumstances, only a reasonable-doubt standard constitutes a meaningful and fair opportunity for Ahmed to challenge his designation. In light of *Winship*, the highest

burden of proof is warranted because society has a great interest in averting the indefinite detention of innocent individuals. The government here is asking for the power to designate as enemy combatant any person residing in the United States (both lawful resident aliens and citizens alike). Because of the likelihood of indefinite detention, such power must be subject to a rigorous safeguard. Such designation should not be allowed to become a means for the government to circumvent the criminal justice system in its detention of civilians. A margin of error exists in any fact finding process, including the determination of enemy combatancy. See *Speiser v. Randall*, 357 U.S. 513, 525 (1958). The strong procedural safeguards of the criminal justice system are designed to minimize this margin of error. Thus, the enemy combatancy determination must mirror the criminal system to the greatest extent possible in order to prevent the erroneous deprivation of liberty, "an interest of transcending value." *Id.* The Government cannot reasonably claim that the application of procedures substantially similar to those afforded criminal defendants is likely to impose an undue burden on its prosecution of the war against terror. A high standard of proof minimizes erroneous detentions and instills into the fact finder a sense of the gravity of the determination being made. In

another respect, a high standard of proof ensures that the designation of enemy combatancy does not become a tool of abuse by the Executive. Like in criminal convictions, every individual must have confidence that the government cannot deprive him of his liberty without convincing as fact finder with utmost certainty. See *In re Winship*, 397 U.S. at 364.

In sum, under the AUMF Congress did not authorize the President to detain persons lawfully residing in the United States. Congress also did not suspend the writ of habeas corpus and therefore Ahmed is entitled to a judicial review of the legality of his detention in proceedings that accord with his right to due process. The district court's proceedings were unconstitutional because they did not afford Ahmed a meaningful opportunity to refute his designation as an enemy combatant.

CONCLUSION

The Appellate court judgment should be reversed.