

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

QUESTIONS PRESENTED FOR REVIEW

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

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

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition for a writ of certiorari was granted on November 24, 2009.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

U.S. Const. art. 1, §9, cl. 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

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.

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.

STATEMENT OF CASE

This case raises the question of whether the President can authorize indefinite military detention for a legal resident in the United States who the government alleges conspired with al Qaeda to engage in terrorist activities without the protections of the criminal trial. It also raises the question of whether the process of the district court for the detainee to challenge the designation as an "enemy combatant" was sufficient under the due process clause of the Fifth Amendment.

I. STATEMENT OF THE FACTS

The petitioner, Burhan Uddin Ahmed (Ahmed) was a legal resident of the United States, studying at Wilson University in Wilson, East Dakota. Ahmed v. United States, No. 06-9701, at 7 (12th Cir. Nov. 24, 2008). Prior or during November 2002, the Federal Bureau of Investigators (FBI) conducted an investigation of Ahmed in the United States. Id. at 7, 47-48. This included at least seizure of his laptop and phone records. Id. at 47-48. In November 2002, Ahmed was charged with possession of counterfeit Social Security cards with the intent to defraud in the District of East Dakota. Id. at 7. In January 2003, he was additionally charged with making a false statement to the FBI. Id. On June 9, 2003 the court scheduled a hearing date for all

pretrial motions for June 15, 2003. Id. One of the important pretrial motions was a motion to suppress evidence that was obtained by torture. Id. Two days before the hearing, the President signed an order stating that charged Ahmed as an enemy combatant and indefinitely detain him. Id. at 7-8. The criminal charges were dismissed and Ahmed is still in custody without charge or trial. Id.

II. PROCEDURAL HISTORY

When Ahmed was under military detention, he filed a petition for a writ of habeas corpus, which asserted that his detention as an enemy combatant was unlawful and that the government has to file criminal charges or release him. Id. at 8. The government opposed his release, claiming that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF) authorized the President to detain Ahmed indefinitely. Id. The government gave the court a hearsay document from John R. Murphy, who is the Director of the Joint Task Force for Combating Terrorism, stating the accusations against Ahmed. Id. Murphy reviewed the intelligence gathered by the FBI and claimed that Ahmed was an operative of al Qaeda acting as a sleeper agent in the United States. Id.

After considering only this evidence, the district court ruled that Ahmed could be detained as an enemy combatant, but could challenge the factual basis of his detention consistent

with his procedural due process rights. Id. at 9. The court then sent the case to a magistrate judge to determine what process was necessary for due process. Id. The magistrate judge said that the government did not have to follow normal procedural safeguards afforded to criminal defendants. Id. Instead, the magistrate judge said that the hearsay evidence that the government provided in the Murphy Declaration was plenty to give Ahmed adequate notice of the factual basis for his detention and did not ask the government for any other evidence. Id. The judge determined that the burden-shifting framework would be used, that it was now up to Ahmed to refute the accusations with more persuasive evidence. Id. Ahmed responded that he was not an enemy combatant and that the procedures that the magistrate judge set out violated his constitutional rights because he should not have to prove his own innocence against hearsay evidence. Id. at 9-10. The magistrate judge, and then the district court dismissed Ahmed's petition for writ of habeas corpus. Id. at 10.

Ahmed appealed the district court decision and dismissed the habeas petition. Id. A Twelfth Circuit panel affirmed the dismissal. Id. This court then granted Ahmed's motion for rehearing, vacating the panel opinion and electing to hear the case en banc. Id. A plurality of the court then reversed the district court's dismissal finding that Ahmed received

inadequate due process. Id. at 28. This Court Granted Certiorari on October 2, 2009.

SUMMARY OF ARGUMENT

The Supreme Court of the United States should reverse the Twelfth Circuit Court finding that the Authorization for the Use of Military Force authorized the indefinite detention of lawful residents accused of being al Qaeda agents and should affirm the holding that Ahmed was not afforded sufficient process in challenging his designation as an enemy combatant.

The Authorization for the Use of Military Force Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF) is insufficiently clear for this court to find that it either, (1) authorizes indefinite military detentions of lawful residents, or (2) that the class of people for whom the detention might be authorized includes Ahmed as a lawful resident accused of being an al Qaeda operative.

The means deemed to be included within the AUMF's "necessary and appropriate" language should be construed narrowly to avoid authorization of indefinite military detention of Ahmed. This is because: (1) the ambiguity or vagueness of the grant fails to rebut the strong presumption in favor of the liberty that the Writ of habeas corpus ensures, (2) Hamdi's interpretation of the AUMF for Taliban fighters is not *a priori*

applicable to al-Qaeda associates apprehended domestically, (3) military tribunals are not constitutional where domestically apprehended petitioners are not associated with foreign governments, (4) an interpretation that allows these detentions would render the suspension clause a nullity and (5) the legislature never intended to grant such authority in the domestic sphere. For these reasons this court should reverse the Twelfth Circuit ruling that the AUMF authorized the indefinite military detention of Ahmed.

The process that the district court gave Ahmed to challenge his designation as an "enemy combatant" violated his due process rights under the Fifth Amendment. Hamdi established that an individual is entitled to a meaningful opportunity to contest the factual basis of an enemy combatant detention before a neutral decisionmaker. To determine which processes are necessary for due process, the court has adopted the Matthews test, which balances the private interests against the government's asserted interest. In this case, the district court allowing hearsay evidence to establish the allegations and setting up a burden-shifting framework that forces Ahmed to prove his own innocence.

The district court erred when it denied Ahmed protections without performing the balancing test set out in Hamdi. The government never showed why it was necessary to have the burden-

shifting framework or the hearsay evidence. Even if the district court performed the test, it did so inaccurately. There were no circumstances that required exceptions to the protections afforded by the Fifth Amendment. Ahmed was prosecuted by FBI and detained in the United States. Furthermore, the government's actions were punitive in nature, trying to curtail the protections available to Ahmed in a criminal trial by changing his status to enemy combatant two days before the pretrial hearing on his criminal charges. For these reasons the Supreme Court should affirm the Twelfth Circuit ruling that the process given to Ahmed to challenge his enemy combatant status violated his Fifth Amendment rights.

ARGUMENT

The Supreme Court of the United States should reverse the Twelfth Circuit Court finding that the Authorization for the Use of Military Force authorized the indefinite detention of lawful residents accused of being al Qaeda agents and should affirm the holding that Ahmed was not afforded sufficient process in challenging his designation as an enemy combatant.

- I. THE AUMF DOES NOT AUTHORIZE MILITARY DETENTION OF LAWFUL RESIDENTS ALLEGED TO BE AL QAEDA AGENTS, AND EVEN IF IT DOES SUCH AN AUTHORIZATION WOULD NOT BE CONSTITUTIONAL**

The Authorization for the Use of Military Force Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF) is insufficiently clear for this court to find that it either, (1) authorizes indefinite military detentions of lawful residents, or (2) that the class of people for whom the detention might be authorized includes Ahmed as a lawful resident accused of being an al Qaeda operative. The AUMF §2(a) authorizes the president to “use all necessary and appropriate force,” against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” Respondent’s argument is that within these scant thirty-three (33) words this court should interpret the congressional authorization to include indefinite detention, without access to habeas courts, of legal residents who are not allied with enemy governments based on little more than government say-so. See Hamdi v. Rumsfeld, 542 U.S. 507, 513 (2004). As a matter both of statutory interpretation and constitutional law as interpreted through precedent.

The means deemed to be included within the AUMF’s “necessary and appropriate” language should be construed narrowly to avoid authorization of indefinite military detention of Ahmed. This is because: (1) the ambiguity or vagueness of the grant fails to rebut the strong presumption in favor of the liberty that the

Writ of habeas corpus ensures, (2) Hamdi's interpretation of the AUMF for Taliban fighters is not *a priori* applicable to al-Qaeda associates apprehended domestically, (3) military tribunals are not constitutional where domestically apprehended petitioners are not associated with foreign governments, (4) an interpretation that allows these detentions would render the suspension clause a nullity and (5) the legislature never intended to grant such authority in the domestic sphere.

A. There Is A Strong Presumption In Favor Of Liberty In Interpreting Grants Of Authority To The Executive That Conflict With The Liberty Of Residents.

The writ of habeas corpus, or the Great Writ, has been seen by many as one of the hallmarks of the European system of laws. Hamdi at 558 (Scalia, J., dissenting). Blackstone went so far as to refer to it as the "second magna carta," and it is the only common law writ specifically mentioned in the constitution. Id. Hamilton, in the Federalist 84, followed Blackstone's reference and recognized habeas as the instrument through which the liberties of the due process clause are enforced. Id. at 555.

Further, doctrine has recognized a presumption in favor of finding the right, enforced by the detainee through habeas, to exist. United States v. Salerno, 481 U.S. 739, 755 (1987) ("liberty is the norm and detention prior to trial or without trial is the carefully limited exception"). Neither the writ of habeas corpus, nor the protections of the due process

clause are limited by the language of the constitution to citizens. U.S. Const. art. 1, §9, cl. 2, U.S. Const. Amend. V. Further, as far back as 1896 courts have recognized that this right to liberty was as applicable to resident aliens, as well as citizens. See Wong Wing v. United States, 163 U.S. 228, 238 (1896) (referring to the due process liberty rights of persons, “[t]hese provisions are universal in their application to all persons within the territorial jurisdiction”). This due process right to aliens has further been interpreted as preventing detention of aliens. See Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem ... Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause protects.”)

This Court in Ex parte Endo, in an eerily similar situation after the Japanese attack on Pearl Harbor, laid out a doctrine for analyzing congressional acts relating to constitutional rights of citizens. 323 U.S. 283, 300(1944). Endo dealt with how to construe a 1942 Act that Congress passed that authorized for the “fullest possible protection against either espionage or sabotage.” Id. In deciding how far to imply what this authorization contained the court stated that,

[w]e must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for *the greatest possible accommodation between those liberties and the exigencies of war*. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was *clearly and unmistakably indicated by the language they used*.

Id. (emphasis added). After observing that neither the congressional act, nor the executive order used explicit detention language, the court found that the detention of Endo had not been authorized and was thus unlawful. Id. At 301-304.

It is notable that the opinion in Endo is just two years after the courts infamous opinion in Ex parte Quirin, 317 U.S. 1 (1942). See Hamdi at 569 (this case was “not this court’s finest hour”) (Scalia, J., dissenting). The opinion was released several months after the military commission’s death sentence had already been carried out. See Id. In Quirin, the court found that military tribunals were lawfully carried out against Nazi saboteurs, one of whom was a U.S. citizen, apprehended after sneaking into the country for purposes of espionage. 317 U.S. at 37-38. It is from this sketchy foundation that the plurality in Hamdi found its justification for finding that detentions were lawful for an United States citizen fighting for the Taliban in Afghanistan. 542 U.S. at 522-23 (O’Connor, J.). Both Quirin and Hamdi, however, remain isolated and rare

instances. The analytical starting point remains that any interpretation involving detention without trial is limited to the most careful and limited of exceptions.

B. Hamdi's Interpretation Of The AUMF For Taliban Fighters Is Not A *Priori* Applicable To Al-Qaeda Associates Apprehended Domestically

The military detention, recognized in Hamdi, was justified along notions of laws of war and the practical necessities to be associated with dealing with enemy combatants. 542 U.S. at 530-535. Crucially, these justifications include notions of protective custody, and an eventual ending of hostilities. Id. The theory is that the military detentions can be necessary as a measure to prevent the captured combatant from going back and taking up arms again until the end of the relevant hostilities. Id. The facts in Hamdi fall directly within these historical understandings. Indeed, the description would seem to describe a traditional war scenario involving a "unit" surrender followed by a "surrendering" of Hamdi's weapon. Id. at 513. Hamdi was captured in enemy territory during a particular battle with an identified hostile governmental entity. Hamdi's detention did have a clear "protective custody" element in that without immediate detention Hamdi could return to arms in the battle. Implicit in the courts narrow holding is the understanding that the particular battle that Hamdi was involved in will likely end, or at the very least, the players are finite and an ending

could be identified if it came. The Hamdi court addressed the problem of a potentially multi-generational war, but within context of a battlefield capture with a particularized governmental enemy the concerns would be far less extreme than here. Lastly, because of the circumstances surrounding Hamdi's capture, the court recognized that it would be inappropriate to force the soldiers on the ground to worry about subsequent litigation in lieu of winning the battle. Id. at 530-535. These critical facts enabled the Hamdi plurality to find that military detentions were a "necessary and appropriate" part of war, and thus lawful. In the situation of al Qaeda, the battle is unhinged from any particular theater with arrests or attacks happening anywhere in the globe and there is no person or entity capable of making a meaningful end of the conflict. The FBI is a civil institution and its job is to enforce the law, which generally includes, at least, the prospect of litigation as its conclusion. Thus, the same burdens that the Hamdi court wanted to protect military officers from are not relevant to the situation with Ahmed.

C. Military Tribunals Are Not Constitutional Where Domestically Apprehended Petitioners Are Not Associated With Foreign Governments

There are two strains of doctrine respecting the constitutionality of military detentions. One strain is that developed through Quirin, and subsequently Hamdi. The other is

through Ex parte Milligan, 71 U.S. 2 , 18 L. ed. 281, 1866 U.S. LEXIS 861(1866). The Quirin/Hamdi strain deal with associates of enemy states, whereas the Milligan strain governs the treatment of non-state actors. This distinction is important because the underpinnings of any justification for military detention rest in the laws of war. See Hamdi 542 U.S. at 530-535. Therefore, the ability to determine if the detainee is, in fact an enemy combatant is a key to the any potential authorizations. With respect to this determination the differences are clear. The "jurisdictional fact" of membership in another country's military force is relatively easily verified. See Quirin, 317 U.S. at 47; Hamdi, 542 U.S. at 571-572 (Scalia, J., dissenting); see also Ludecke v. Watkins, 335 U.S. 160, 161-62 (1948) (stating that enemy alien status rests on affiliation with the enemy nation). By contrast, establishing the fact of affiliation with a terrorist organization is a complex undertaking that would often involving questions of scienter and degrees of involvement.

Where the detainee is not associated with a state actor the detainee cannot lawfully be denied the Writ of Habeas Corpus. In Ex parte Milligan, this Court refused to allow four members of a vast and dangerous organization, the "Order of Sons of Liberty" which worked against the Union to advance the Confederate cause, to be militarily detained. 71 U.S. 121-22,

18 L. ed. 281, 285, 1866 U.S. LEXIS 861, 209. The group was potentially around one hundred thousand men and was deeply embedded in the fabric of civilian life, and had the goals of sabotaging infrastructure. Indeed, in Milligan, the government's justification for the military trial was that if the conspirators were tried in civil courts "any courthouse ... would have been destroyed" by the organization. 1866 U.S. LEXIS at 176. Citizens have historically been treated as traitors in similar situations. Hamdi 542 U.S. at 559 (Scalia, J., dissenting). Indeed, all the associates, save one, of the saboteurs involved in Quirin were tried in the criminal process. See Id. at 560; Haupt v. United States, 330 U.S. 631, 91 l. ed. 1145, 67 S. ct. 874 (1947).

The Hamdi holding should be read entirely in this context. The holding was carefully limited in finding that the AUMF authorized detentions with respect individuals "who **fought against** the United States **in Afghanistan as part of the Taliban,**" and only "for the duration of the particular conflict in which they were captured." Hamdi 542 U.S. at 518(emphasis added). The plurality further cautioned that "[i]f the practical circumstances of a given conflict" differed from those of the traditional conflicts that informed the law of war, the AUMF may not authorize military detention at all. Id. at 521. This careful limitation was the key to reconciling Hamdi with

precedent embodied in Quirin and Milligan. The fact that Hamdi fought as a member of the Taliban allowed the court to find that the facts lined up with the holding in Quirin. In Ahmed's case the facts are clearly more aligned with that of Milligan and military detentions would not be allowed.

The circuit court has fundamentally misunderstood the nature of al Qaeda in this regard in deciding that "there is no question that persons ***associated with al Qaeda, the organization known to have carried out the 9/11 attacks*** ... sent here as sleeper agents and terrorist operatives charged with committing additional attacks ... are individuals Congress sought to target in passing the AUMF." Ahmed v. United States, No. 06-9701, at 14 (emphasis added) (quoting Hamdi, 542 U.S. at 518). The opinion would make it seem as though an associate of al Qaeda is something plainly determinable. In fact when dealing with organizations of such an informal nature, it is anything but easy to determine. This is evident in the structure and language of the Murphy declaration itself. The declaration leads through a series of scant and unelaborated associations and circumstances that it draws the conclusion that Ahmed is an "al Qaeda agent." Id. at 48. The reader of the declaration must surely wonder what separates the "agent" from the al Qaeda "operatives," "leaders" and "officers" mentioned as the characters with whom Ahmed is claimed to have associated. Id. at

47-48. The deference for all that can be determined is how the government chooses to label the individual. The declaration further lacks the one element that was crucial in the Hamdi courts finding that the he was an enemy combatant, namely the act of "taking up arms" against the United States.

It is true that the prospect of sleeper cells in this country ready to do harm represents a cause for great and true fear, however, this is not cause to reconsider and reinterpret the procedural working of the Writ of habeas corpus. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) ("[the founders] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation"). The criminal procedures the constitution should be allowed to this new situation as they have all prior crises and emergencies.

D. An Interpretation That Allows These Detentions Would Render the Suspension Clause a Nullity

In addition to codifying the writ of habeas corpus, the constitution codifies the procedure for suspending the writ in Art. 2, §9 cl. 2 (Suspension clause). The constitution thus places in Congress the power to suspend the writ when "in cases of rebellion or invasion the public safety may require it." It

is uncontested that the AUMF is not a suspension. Hamdi 542 U.S. at 574 (Scalia, J., dissenting). Respondent's interpretation of the AUMF, however, threatens to render the suspension clause and its procedural requirements a nullity. If a *de facto* suspension of the Writ is now to be found within the vague phrase "necessary and appropriate," then any protections the founders may have intended by their procedural requirements would be lost. See Id. at 575 (Scalia, J., dissenting) (if "Congress by ordinary legislation says he can be detained, [the suspension clause] guarantees him very little indeed").

E. Legislature Never Intended to Grant Such Authority in the Domestic Sphere.

There are two statutes that suggest that the legislature did not intend to include military detentions in the authorization. These are the Non-Detention Act, 18 U.S.C. §4000 *et seq*, passed in the wake of the infamous interning of Japanese American citizens during the second world war, and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-54, 115 Stat. 272 (Patriot Act) passed just days after the AUMF.

The Non-Detention act states that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." §4000(a). The act was passed

in 1948 and in response to, the now infamous, internment of Japanese Americans during the Second World War. Congress meant to preclude another episode like the one described in Korematsu v. United States, 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (1944); See H. R. Rep. No. 92-116, pp. 2, 4-5 (1971); Hamdi at 607 (Souter, J., dissenting). Although the plurality in Hamdi held that the AUMF amounted to a sufficient act of congress, the reasoning was based on their finding that the AUMF authorized Hamdi's detention and *not* based on a finding that §4000(a) did not apply to military detentions. Hamdi at 517. Thus, the fact that the detention of Hamdi passed the §4000(a) test does not *a priori* mean that the detention of Ahmed would pass the test, even though in both instances the AUMF represents the authorizing Act. Ahmed's detention is far more similar to the internments that gave rise to the passage of the Non-Detention Act. Ahmed was a lawful resident apprehended by civil authorities, the strictures of §4000(a) are more squarely applicable. It is for this reason, given the specificity requirements of Endo, the logical conclusion is that Congress, in using such broad language as it did in the AUMF, assumed that §4000(a) was not abrogated with respect to the domestic residents.

Further evidence that the Congress did not intend to permit indefinite detention is found within the Patriot Act passed in

the same week of the AUMF. In the controversial Patriot Act, the ability of the government to detain without charge is expressly limited. §412 prohibits "indefinite detention" or terrorist aliens. Instead, it requires that "not later than 7 days after the commencement of such detention," the Attorney General must either (1) begin "removal proceedings" or (2) "charge the alien with a criminal offense." Id.

The circuit court refused to recognize the Patriot Act's language as limiting the potential interpretation of the AUMF under the dubious logic that the two bills dealt with differing power grants to the executive. Ahmed v. United States, No. 06-9701, at 17-18 (The Patriot act pursuant to the faithful execution of laws power Art 2 §3 and the Art 2§2cl 1 Commander-in-chief power). Such a formulaic distinction is inappropriate in an area such as domestic terrorism where the realms are so mixed. In the case at bar, Ahmed was apprehended and investigated by the FBI, a civil authority as opposed to some military entity. Id. at 7. Even assuming *arguendo* that this distinction can be meaningfully maintained in the area of domestic law enforcement, the Patriot act at the very least is compelling evidence that the Congress did not interpret the language of the AUMF so broadly as to include military detention of domestic residents, apprehended by civil authorities. The Patriot act clearly involved a debate over how to handle

terrorist aliens and the decision was clear that indefinite detention was not appropriate.

II. THE PROCESS AFFORDED BY THE DISTRICT COURT TO CHALLENGE A DESIGNATION AS AN "ENEMY COMBATANT" VIOLATES THE REQUIREMENTS OF THE FIFTH AMENDMENT

The district court denied Ahmed due process in his proceedings to challenge his designation as an enemy combatant that is owed to him under the Fifth Amendment. In Hamdi the court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." Hamdi, 542 U.S. at 509. Ahmed was not given a meaningful opportunity to contest his "enemy combatant" designation. The district court failed to properly apply the framework set out in Hamdi to the circumstances at hand. The burden shifting framework and lack of procedural safeguards unconstitutionally violate Ahmed's freedom. This is particularly true when the government charges Ahmed as an "enemy combatant" during a criminal proceeding, showing that the indefinite detention was punitive and not preventative in violation of the Fifth Amendment.

A. The District Court Failed to Apply the Balancing Test Set Up in Matthews and Hamdi to Ahmed's Enemy Combatant Trial

Government proceedings are governed by 28 U.S.C. § 2241 and its companion provisions. These outline what is necessary under

normal provisions to maintain due process. The court in Matthews v. Eldridge held that there is a balancing test to determine due process owed to the individual under the Fifth Amendment. 424 U.S. 319, 334 (1976). This test weighs “the private interests that will be affected by the official action against the Government’s asserted interest.” Hamdi, 542 U.S. at 529 (quoting Matthews, 424 U.S. at 335) (internal quotes omitted). It sets up a three part test to weigh these competing interests.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews, 424 U.S. at 335. Hamdi applies this test to the procedural protections for “enemy combatant” trials.

In Hamdi, the court first looked at Hamdi’s private interest, his liberty and freedom from detention. Hamdi, 542 U.S. at 529. Then the court states that “risk of erroneous deprivation of a citizen’s liberty in the absence of sufficient process here is very real.” Id. at 530. An unchecked system of detention would cause oppression. Id. Next, the court weighs

these issues against the national security and practical difficulties that come with these processes. Id. The court concludes the probative value of the process must be weighed against the burden they impose on the military. Id. Full protections that accompany detentions **may prove** to be unworkable or inappropriate in the particular circumstances. Id. at 535. This statement indicates that full protections should be given in the enemy-combatant setting unless the government claims that there would be a threat to military operations. The court concluded that the threats posed to the military did not outweigh Hamdi's right to challenge the government's case and be heard by a neutral decisionmaker. Id.

1. The Murphy Declaration Violates Ahmed's Right to Due Process

The Murphy Declaration is hearsay evidence in violation of Ahmed's right to due process. The Fifth Amendment guarantees minimum requirements for due process, which include that the right to confront and cross-examine adverse witnesses. Morrissey v. Brewer, 408 U.S. 471, 489 (1972). Because of this, the Court held that this right can only be taken away when the government shows good cause for the denial. Id. Indeed, Hamdi specifically says that **"the exigencies of the circumstances may demand that,** aside from these core elements, enemy combatant proceedings **may** be tailored to alleviate their uncommon

potential to burden the Executive at the time of ongoing military conflict.” *Hamdi*, 542 U.S. at 533 (emphasis added). In *Hamdi*, Michael Mobbs, the special advisor to the Under Secretary of Defense for Policy, made a declaration outlining the reasons the government labeled Hamdi an enemy combatant. *Id.* at 513. The government contended that the declaration was all that was necessary because Hamdi was captured in a zone of active combat in a foreign theater of conflict. Furthermore, additional evidence would be unduly burdensome to produce and hurt national security since it was halfway across the globe. *Id.* at 514, 538. The court indicated that the Mobbs Declaration may be accepted, as long as the accused has the right to refute the evidence, but that “a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a fact finding process that is both prudent and incremental.” *Id.* at 538-39.

The case at hand differs from *Hamdi*. The government provides no reason that hearsay evidence was necessary in Ahmed’s case or why a tailoring of his rights concerning his liberty should be allowed. In *Hamdi*, the government shows good cause for a reason to deny the detainee the right to confront and cross-examine Murphy. That the evidence collected was in a foreign battle zone of active combat, and therefore, it would

both hurt national security and be unduly burdensome. Hamdi, 542 U.S. 531-32. The government fails to give **any** reason that the hearsay or burden shifting framework should be admitted in Ahmed's case. It is not within the district court judge's jurisdiction to assume or make up a reason for the government's hearsay evidence. Therefore, the District Court improperly violated Ahmed's due process in violation with the Fifth Amendment.

B. Even if the Government Would Have Given a Cause, Ahmed's Liberty Interests Would Outweigh it Given the Circumstances of Detainment

The circumstances surrounding Ahmed's detention show how the district court allowance of the burden shifting framework and hearsay evidence violated his due process rights. The procedural safeguards are in place to preserve ones liberty against illegal detention. Hamdi, 542 U.S at 532. These rights must be preserved even during times of war, "it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." Id. In Hamdi, the government stated that hearsay evidence and the burden shifting framework were necessary because of the practical difficulties that would accompany the normal procedures. Hamdi, 542 U.S. at 531. The Court describing those practical difficulties observed that, "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted

by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense.” Id. at 531-32. The Court concluded that because of the undue hardships that the government faced, the Mobbs Declaration **may** be accepted as long as the detainee can rebut the facts. Id. at 538.

This case does not provide the same exigencies of circumstances necessary to tailor the procedural safeguards set up to protect liberty as in Hamdi. The military detained and interrogated Hamdi in Afghanistan. Hamdi, 542 U.S. at 510. In contrast, Ahmed was first arrested by the FBI in the United States and only later designated an enemy combatant. Ahmed, p. 7. This is important for two reasons: first he was detained in the United States and second, that it was by domestic civilian authorities. Id. All of the known investigation of Ahmed’s actions were committed in the United States, not halfway across the globe. Id. The investigation of Ahmed’s laptop, his cell phone and all interrogations occurred in the United States by the FBI. Id. at 47-48. Conversely in Hamdi, the court would have allowed hearsay evidence because the alternative would have meant that active military officers who conducted the investigation would had to be excused from their duty to protect the United States and flown back to testify. Hamdi, 542 U.S. at

531-32. In Hamdi the investigation was done by the military. Id. at 510. The FBI conducted the entire investigation surrounding Ahmed's detention and it was only after he was in custody did his status change to "enemy combatant." P. 7. This is important because the purpose of the military is to defend the United States, while the purpose of the FBI is uphold the laws of the United States. The FBI prosecuted Ahmed; therefore they were prepared to present evidence of his crime and the investigation surrounding his detention according to normal courtroom procedures that are foreign to soldiers, whose main goal is to fight and defend their country. Lastly, Hamdi was accused of being trained and actively fighting with arms as a part of the Taliban against the United States. Hamdi, 542 U.S. at 510. In contrast, Ahmed had not attacked the United States himself, but was only incidental to the alleged planned attacks. P. 7 For all of these reasons, the special circumstances that would have allowed the hearsay evidence and possibly the burden shifting framework in Hamdi are not present in Ahmed's case and therefore Ahmed's constitutional rights are violated.

C. The Denial of Normal Procedures Violates Due Process Because the Government's Purpose in Detaining Ahmed Was Punitive

Ahmed's military detention as an enemy combatant is the government's unconstitutional attempt to circumvent criminal punishment. The United States has held that the government

interest in punishment should be vindicated through criminal process when possible, not indefinite detention. United States v. Salerno, 481 U.S. 739, 746-47 (1987); Foucha v. Louisiana, 504 U.S. 71, 82 (1992). Even though there are circumstances where there are fewer protections afforded to a civil detention, those should remain strictly limited. Kansas v. Crane, 534 U.S. 407, 412 (2002). This strict limitation is necessary to prevent the government from labeling criminals as enemy combatants so that they are able to detain them indefinitely. In his dissenting opinion in Hamdi, Scalia states "it is unthinkable that the Executive could render otherwise criminal grounds for detention non criminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing." 542 U.S. at 556-57. The government should not be able to circumvent procedural safeguards by merely changing a criminal's status.

Ahmed's case is a clear example of an unconstitutional violation of due process. Hamdi was always detained as an enemy combatant and shipped to Guantanamo Bay, Cuba. Hamdi, 542 U.S. at 510. Hamdi was never charged with any domestic criminal acts, nor arrested by civilian authorities. Unlike Hamdi, Ahmed was first arrested and detained by the FBI. P. 7. The government charged Ahmed as an enemy combatant two days before

the criminal hearing on pretrial motions. P. 7 One of these was a motion to suppress evidence against Ahmed that was obtained by torture. Id. The procedural safeguards to ensure due process for criminal trials should not be suppressed only because the government decides to call an accused criminal an "enemy combatant." It is a grave deprivation of liberty to allow the government to deny protections to accused criminals by labeling them "enemy combatants" and detaining them indefinitely if the government does not have enough evidence to convict an individual with those protections in place.

CONCLUSION

The AUMF cannot be interpreted as authorizing a military detention of domestically apprehended residents who are not associated with enemy governments. Further, even if the AUMF could be so interpreted, Milligan and the overriding importance of the writ of habeas corpus to the liberty of all peoples living in this republic does not allow such an authorization.

Even if a legal resident can be charged civilly detained for conspiring with Al Qaeda, the district court violated Ahmed's due process rights by unfairly denying him his rightful procedural protections. The circumstances surrounding Ahmed's detention, especially that he was arrested in the United States by domestic civilian authorities and the fact that the

government did not state a reason to tailor the procedural safeguards, indicate that the district court violated the Fifth Amendment. Therefore, for either of these reasons the Twelfth Circuit ruling should be affirmed.

Respectfully Submit,

Team 3640