

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 4900
COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

1. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes, and if so whether the Constitution allows, the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge 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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PARTIES TO THE PROCEEDING

Petitioner:

Burhan Uddin Ahmed.

Respondent:

United States of America.

OPINIONS AND ORDERS ENTERED IN THE CASE

The opinion of the United States Court of Appeals for the Twelfth Circuit, Burhan Uddin Ahmed v. United States of America, No. 06-9701, is reported at __F.3d__ (12th Cir. 2008), and is set forth in the Record at pages 1 through 46.

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Twelfth Circuit entered a Judgment on November 24, 2008. R. at 5. Petitioners timely sought Certiorari, which this Court granted on October 02, 2009. R. at 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2008).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on 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 offense 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.

U.S. Const. Amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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.

**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.

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

To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

- (a) SHORT TITLE- This Act may be cited as the 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001'.

SEC. 412. MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW.

- (a) IN GENERAL- The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after section 236 the following:

'MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW

SEC. 236A. (a) DETENTION OF TERRORIST ALIENS-

- '(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-
 - '(A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(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.
- '(7) REVIEW OF CERTIFICATION- The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General

reconsider the certification and may submit documents or other evidence in support of that request.

^(b) HABEAS CORPUS AND JUDICIAL REVIEW-

'(1) IN GENERAL- Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

'(2) APPLICATION-

'(A) IN GENERAL- Notwithstanding any other provision of law, including section 2241(a) of title 28, United States Code, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with-

'(i.)the Supreme Court;

'(ii.)any justice of the Supreme Court;

'(iii.)any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or

'(iv.)any district court otherwise having jurisdiction to entertain it.

'(B) APPLICATION TRANSFER- Section 2241(b) of title 28, United States Code, shall apply to an application for a writ of habeas corpus described in subparagraph (A).

'(3) APPEALS- Notwithstanding any other provision of law, including section 2253 of title 28, in habeas corpus proceedings described in paragraph (1) before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia

Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.

'(4) RULE OF DECISION- The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described in paragraph (1).

'(c) STATUTORY CONSTRUCTION- The provisions of this section shall not be applicable to any other provision of this Act.'

(b) CLERICAL AMENDMENT- The table of contents of the Immigration and Nationality Act is amended by inserting after the item relating to section 236 the following:

`Sec. 236A. Mandatory detention of suspected terrorist; habeas corpus; judicial review.'

(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.

STATEMENT OF THE CASE

On September 8, 2001, Pakistani citizen Ahmed lawfully entered the United States in pursuit of a doctoral degree in veterinary medicine at Wilson University in Wilson, East Dakota. R. at 7. On September 11, 2001, tragedy struck when terrorists attacked the United States. Within seven days, Congress empowered 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." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF). R. at 6. Thirty-Eight Days later, Congress passed the Patriot Act narrowing the President's authority to detain aliens within the United States on suspicion of terrorism and requiring the Attorney General within seven days, to "place the alien...in a removal proceeding...charge the alien with a criminal offense...,or release the alien." 8 U.S.C. § 1226a(a)(5) (2009). The Attorney General's power to detain suspected terrorists during the pendency of their removal proceedings is subject to strict procedural safeguards and requires the Attorney General or the Deputy Attorney General to personally certify that releasing the alien would pose a national security risk. *Id.* § 1226a(a)(4), (a)(6). After the initial certification, "[t]he

alien may request each 6 months in writing that the Attorney General reconsider the certification" *Id.* § 1226a(a)(7). A mere four months after his lawful entry, Ahmed was arrested by federal agents as a material witness in the governments investigation of the 9/11 attacks. Ahmed pleaded not guilty to charges of possessing counterfeit Social Security cards with the intent to defraud in November 2002, and to making a false statement to the FBI in January 2003. A hearing was scheduled for June 15, 2003, on all pretrial motions including a motion to suppress evidence that Ahmed claimed was obtained by torture. The government filed an *ex parte* motion to dismiss the indictment citing an order signed by President George W. Bush that claimed Ahmed's detention by the military was "necessary to prevent him from aiding al Qaeda." Ahmed was surrendered to the Secretary of Defense, and is being detained as an "enemy combatant" without charge or trial, and has not been given any indication as to when this detention will end. R. at 7, 8.

Ahmed filed a writ of habeas corpus under 28 U.S.C. § 2241 (2008) to secure his release from military detention. The government relies on the Declaration of John R. Murphy (Murphy Declaration)¹ to allege Ahmed is an al Qaeda affiliate who "prepar[ed] for acts of international terrorism." R. at 8. The

¹ Appendix A contains a copy of the Murphy Declaration.

district court determined that Ahmed was entitled to challenge the factual basis of his detention. The presiding magistrate judge determining the process that Ahmed must be afforded withheld procedural safeguards substantially equivalent to those criminal defendants receive and in considering the Murphy Declaration, ruled that Ahmed had been provided with "adequate notice of the factual basis for his detention" and that the government has "offered sufficient evidence" that Ahmed was an enemy combatant. This shifted the burden to Ahmed to produce "more persuasive evidence." R. at 9. Ahmed argued that he should not be forced to prove his own innocence and refused to offer any evidence to rebut the Murphy Declaration's claims or his designation as enemy combatant. The district court dismissed Ahmed's writ of habeas corpus and upon a rehearing, the Twelfth Circuit concluded that the AUMF empowered the President to hold Ahmed as an "enemy combatant", but that he was not afforded sufficient process to challenge the designation. R. at 6, 10.

This case comes before the The United States Supreme Court on grant of a Writ of Certiorari to review the determination of the Twelfth Circuit as to whether the AUMF authorizes the President to detain enemy combatants and subject them to indefinite military detention; and, whether Ahmed was provided sufficient process to challenge this designation. R. at 2.

SUMMARY OF THE ARGUMENT

I. In seeking to hold Ahmed indefinitely without charge, the government attempts to bypass the Congressional intent expressed in the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (Patriot Act) and asks this Court to interpret an unrestrained reading of the AUMF by granting authorization for the President to seize and detain U.S. citizens and resident aliens on American soil, even if they never affiliated with a foreign military or set foot on a foreign battlefield. Under settled principles of statutory interpretation, the governments breathtakingly expansive reading of the AUMF should be rejected.

II. Classifying persons as an "enemy combatants" does not lower the burden on the United States to afford adequate due process rights guaranteed under the Fifth Amendment and the use of the Murphy Declaration conflicts with both the Constitution and this courts precedent. Ahmed's silence cannot be used as a means to punish him with an indeterminate period of incarceration and transferring him from civilian to military authorities conflicts with federal statute and our founders intent. The Constitution requires the United States to place Ahmed in a removal proceeding, charge him with a criminal offense, or release him.

ARGUMENT

I. Congress's Authorization For Use Of Military Force Does Not Empower, And The Constitution Does Not Allow, 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.

(A) The AUMF Does Not Authorize The Executive Branch To Indefinitely Detentain Ahmed And Other Resident Aliens Seized Within The United States Because Congress's Subsequent Patriot Act Served As An Explicit And Unambiguous Restraint On Executive Detention.

1. The Plain Text Of The Patriot Act Limits The Executive's Power To Indefinitely Detain Resident Aliens On Suspicion Of Terrorism.

Thirty-eight days after passing the AUMF, Congress passed the Patriot Act which narrowly defined the President's authority to detain aliens within the United States on suspicion of terrorism; with an entitled subheading "[l]imitations on indefinite detention." 8 U.S.C. § 1226a(a)(6). While the text of the Patriot Act is plain and unambiguous, a cursory reading of the legislative history confirms from the onset of its drafting, Congress's intent to place strict limits on the President's detention powers. Congress rejected the initial legislation proposed by the Administration, entitled the Anti-Terrorism Act of 2001, that would have allowed for indefinite detention with no limitations or restrictions. The proposal drew bipartisan condemnation and resulted in the administration capitulating to

a more restricted provision.² See, Neil A. Lewis & Robert Pear, *A Nation Challenged: Congress; Negotiators Back Sealed-Down Bill to Battle Terror*, N.Y. Times, Oct. 2, 2001, at A1 ("The proposal for indefinite detention of immigrant suspects engendered the greatest opposition from civil libertarians both inside and outside of Congress."). The Patriot Act's legislative history reaffirms its plain text: That the President cannot detain a resident alien for more than seven days without bringing criminal charges or initiating deportation proceedings; and, even after this occurs, the President can only detain the alien by following the procedural framework set forth in the Patriot Act. As of yet, none of the proper procedures have been followed by the government, and therefore the detainment of Ahmed is, as a matter of law, unconstitutional.

2. The Patriot Act Usurps The Government's Strained And Expansive Interpretation Of The AUMF.

Because the Patriot Act places specific limitations on the detention of resident aliens, the Government is incorrectly

² See *Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. on the Judiciary*, 107th Cong. 14 (2001). (statement of Rep. Conyers) (indefinite detention provision "give[s] us constitutional trouble"); *Id.* at 20 (statement of Rep. Berman) (criticizing provision "to detain in perpetuity people in detention without limits, without requirement of deportation, without requirement of prosecution"); *Id.* at 30 (statement of Rep. Lofgren) ("[T]he indefinite detention is a real issue ... there is no time line during which the deportation proceedings must be undertaken."); *Homeland Defense: Hearings before the S. Comm. on the Judiciary*, 107th Cong. 26 (2001). (statement of Sen. Spector) (criticizing proposal for giving "the authority to detain on that very generalized standard without any evidentiary base or probable cause").

interpreting the AUMF as granting the President unlimited detention powers which conflicts with settled principles of statutory interpretation. A specific statute generally takes precedence over a general one. *See, e.g. Hinck v. United States*, 127 S.Ct. 2011, 2015 (2007). (stating that "a precisely drawn, detailed statute" traditionally "pre-empts more general remedies" and are "regarded as exclusive") (quotation marks omitted). Moreover, later statutes usually trump earlier enactments. *See, e.g., United States v. Estate of Romani*, 523 U.S. 517, 530 (1998) (resonating that "a specific policy embodied in a later federal statute should control our construction" of an earlier statute). Because the Patriot Act was past after the AUMF, its more recent limitations on the Executive Branch's detainment powers usurp any detention powers deduced from the much broader provisions of the AUMF.

Congressional intent was crystallized when it passed the Patriot Act thirty-eight days after the AUMF with specific limitations on the detention of resident aliens. Time and again, this Court has not interpreted broad legislative provisions in such a way that the results conflict with other acts passed by the same Congress. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) ("It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to

conclude executive agreements [when enacting International Emergency Economic Powers Act (IEEPA)] sought to accomplish that very purpose *sub silentio* through the Foreign Sovereign Immunities Act (FSIA)".³ 50 U.S.C. § 1702 (2008); 28 U.S.C. § 1602 (2008). Similarly, it is "quite unlikely" that the administration would request, and Congress would unequivocally withhold, the power to detain resident aliens seized within the United States indefinitely, if the same Congress had granted those same detention powers to the President thirty-eight days prior. Therefore, as a matter of law, the governments over-broad reading of the AUMF should be rejected.

(B) Judicial Interpretation Of The AUMF Should Not Override Congressional Intent.

The government will likely invoke the decision in *Al-Marri v. Pucciarelli*, and argue that the Patriot Act can simply be ignored because it does not speak directly to the conflict with al Qaeda. 534 F.3d 213, 276 (4th Cir. 2008). In its Brief in

³ See also *Gonzaga University et al. v. Doe*, 536 U.S. 273, 290 (2002) (concluding that the subsequent legislation requiring the Department of Education to centralize enforcement of Family Educational Rights and Privacy Act (FERPA), "[i]t is implausible to presume that the same Congress ... intended private suits to be brought ... which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid"); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 667 (1995) ("To interpret the Employee Retirement Income Security Act's (ERISA's) pre-emption provision as broadly as respondents suggest, would have ... left States without the authority to do just what Congress was expressly trying to induce them to do Given that the NHRDA was enacted after ERISA and by the same Congress, it just makes good sense to reject such an interpretation.")

Opposition to Certiorari, the government reverberates Judge Wilkinson's assertion that the two acts have "separate spheres" because "the AUMF represents a specific response to the 9/11 attacks, authorizing military force against those responsible for the attacks," while the Patriot Act's standards for executive detention are "designed to prevent terrorism generally, regardless of whether the suspect was associated with 9/11." *Id.* citing Pet.App.201a (Wilkinson, J.).⁴ Any assertion by the government that the detention provisions of the Patriot Act were not directed at the persons who planned the 9/11 attacks blurs the issue in this case. The Patriot Act was presented to Congress by the administration as "America's response to the criminal act of war perpetrated on the United States of America on September 11."⁵ *Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H.Comm. on the Judiciary, 107th Cong.*

4 The government's Brief in Opposition does not discuss or defend Chief Judge Williams' assertion that the Patriot Act regulates the President's authority to detain under the Take Care Clause of the Constitution and the AUMF provides separate authority to detain pursuant to the Commander-in-Chief Clause. Pet.App. 169a.

5 Those who supported the administration's proposal similarly anticipated that the Patriot Act would be applied to apprehend and punish the perpetrators of the 9/11 attacks. See *Id.* at 3 (statement of Rep. Sensenbrenner) ("I urge the Members of this Committee to stand united together in recognition of the important purpose we must serve in preventing future terrorist attacks and prosecuting those who have already attacked us."); *Id.* at 28-29 (statement of Rep. Chabot) ("[T]he vicious terrorist attacks of September 11 represent nothing less than a declaration of war against our country. To win this war, we must use every investigative law enforcement and military resource at our disposal to find and punish the individuals or governments responsible for these terrible crimes.").

3 (2001) (statement of John Ashcroft, Att’y Gen. of the United States). Attorney General Ashcroft argued that the detention proposal was an intergral component in the administration’s efforts to detect and apprehend those responsible for the attacks: “[T]he investigation into ... September 11 is ongoing, moving aggressively forward. To date, the FBI and INS have arrested or detained 352 individuals ... because we think have ... information that could be helpful to the investigation.” *Id.* at 7. By relegating the Patriot Act to a “separate sphere,” the government asks the Court to infer grants of authority from the AUMF that could potentially supplant any and all domestic laws unless, perhaps, the text of those laws specifically referenced the 9/11 attacks. This approach is not rooted in the Constitution’s separtation of powers or in this Court’s precedents. For example, just several years ago, this Court affirmed that the general language of the AUMF does not supersede longstanding provisions of the Uniform Code of Military Justice governing military commissions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (finding no authority in the AUMF to employ military commissions when “Congress has denied the President the legislative authority to create military commissions of the kind at issue here”); see also Daniel J. Freeman, *Note, The Cannons of War*,

117 Yale L.J. 280, 304 (2007) (surveying cases and concluding that "in nine of twelve cases the courts found that a specific framework statute trumps a more recent AUMF"). Therefore, the general rule that the AUMF does not automatically repeal pre-existing domestic laws is reaffirmed in the present case because the Patriot Act was enacted one month after the AUMF. The current case is not one where an outdated statute failed to anticipate a new military emergency. Moreover, while the government has used the argument to support the detention of al-Marri, it was rejected by Congress during the hearings on the Patriot Act. Those testifying in favor of the administration argued that the detention of aliens was crucial to the war efforts against al Qaeda.

Today ... we ... face the problem of enemy aliens in our midst ... because no foreign nation state is prosecuting the war against us, we cannot determine the identity of potentially alien enemies ... unlike previous wars, they may have ready access to weapons of mass destruction targeted at civilians ... it is reasonable to provide the Attorney General with authority to find and detain the relatively few aliens who are our potential enemies. This new kind of alien detention authority is proportionate to the new kind of war we face.

Protecting Constitutional Freedoms in the Face of Terrorism: Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S.Comm. on the Judiciary, 107th Cong. 25 (2001) (testimony of John O. McGinnis, Professor of Law,

Benjamin N. Cardozo Sch. of Law). After failing to convince Congress of the need for indefinite detention powers, the administration now attempts to persuade the judiciary to allow the same detention policies prohibited by Congress. In *Ex parte Milligan*, the government argued that the danger of sleeper cells in Indiana served as justification of the domestic seizure and detention of Milligan, notwithstanding Congressional direction that all civilian detainees be promptly indicted or released. 71 U.S. 2, 133-34 (1866) (Chase, C.J., concurring in part and dissenting in part). The four Justices who concurred in judgment but dissented from *Milligan's* constitutional holding were persuaded that the danger of enemy sleeper cells in Indiana might be serious enough to justify Milligan's detention as a constitutional matter. *Id.* at 140.⁶ However, while those four Justices dissented, they understood that their assessment of whether such detention should be authorized could not supersede Congress's refusal to do so. "It was for Congress to determine the question of expediency ... That body did not see fit to authorize trials by military commission ... but by the strongest implication prohibited them." *Id.* at 141. Accordingly, those

⁶ Arguing that Milligan was a member of "a powerful secret association, composed of citizens and others ... under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government"

Justices concurred in the Courts unanimous holding that Milligan must be tried or released. Almost a century after this ruling, this Court reaffirmed in *Youngstown* that the courts should not second-guess the will of Congress based on the judges' own determination that "it may have been desirable to have given the President further authority, a freer hand" to respond to national security concerns: "The need for new legislation does not enact it." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 603, 604 (1952) (Frankfurter, J., concurring); cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 577-78 (2004) (Scalia, J., dissenting). Similarly to *Youngstown*, it would be quite ironic for this Court to override Congressional intent as expressed in the Patriot Act in the guise of interpreting the general provisions of the AUMF:

It is one thing to draw an intention ... where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem ... to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard ... the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between ... President and Congress.

Youngstown, 343 U.S. at 609 (Frankfurter, J., concurring).

As a matter of law, this Court should reject any request to expand the government's detention authority in accordance with *Milligan* and *Youngstown*. As Congress explicitly refused to grant

the President the authority to hold resident aliens indefinitely, the AUMF may not be interpreted by the Judiciary to grant this authority that Congress refused to allow.

(C) Treating Individuals Lawfully Within The United States As Enemy Combatants Based Solely On Suspicions Of Involvement In Terrorism Constitutes A Significant Expansion Of Traditional Executive Detention Powers.

The founders of the United States "viewed freedom from unlawful restraint as a fundamental precept of liberty." *Boumediene v. Bush*, 128 S.Ct. 2229, 2244 (2008); see *Hamdi* 542 U.S. at 529.⁷ ([T]he most elemental of liberty interest [is] ... being free from physical detention by one's own government.) (plurality opinion).⁸ "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned...save by the judgment of his peers or by the law of the land." *Rasul v. Bush*,

⁷ Indefinite detention without trial raises serious concerns. See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001). This Court has long held that resident aliens are fully protected by the Fifth and Sixth Amendments. See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived life, liberty, or property without due process of law.") Resident aliens have a substantive due process right to be free from bodily restraint that is "strong enough to raise a serious question as to whether ... the Constitution permits detention that is indefinite and potentially permanent." *Zadvydas*, 533 U.S. at 696.

⁸ For almost six centuries prior to the birth of this nation, English law acknowledged that the deprivation of an individuals' freedom "without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom." 1 William Blackstone, *Commentaries* 136; see also *The Federalist* No. 84, at 480 (Alexander Hamilton) (Clinton Rossiter ed. 1991) (decrying "the practice of arbitrary imprisonments" as "the favorite and most formidable instruments of tyranny").

542 U.S. 466, 474 (2004) (citation omitted). The survivors of colonial military hegemony were mindful of the threatening nature military participation in domestic affairs posed to liberty, including military detention of alleged enemies of the state. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 319-20, 323-24 (1946). Ergo, the Constitution was established to ensure that "liberty is the norm, and detention without trial is the carefully limited exception." *Hamdi*, 542 U.S. at 529. This applies to resident aliens as well as United States citizens. "[L]awful residence implies protection" under the Constitution. *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) (citation omitted). "Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Boumediene*, 128 S.Ct. at 2246 (citations omitted). Resident aliens do, however, enjoy reduced protection, in relation to citizens, under some circumstances. For example, they are subject to limited executive detention related to deportation, see *Zadvydas*, 533 U.S. at 689, and can be detained for the duration of a declared war if they are citizens of an enemy nation, see *Ludecke v. Watkins*, 335 U.S. 160 (1948). In the

present case, however, the United States has not suggested that Ahmed falls within any such exceptions. The Court in *Hamdi* considered one such exception, opining that the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Hamdi*, 542 at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)). In light of that historical understanding, the Court rejected the claim that Hamdi's detention as an enemy combatant was in violation of the Constitution, observing that he was captured in a traditional war, fighting on behalf of the Taliban government of Afghanistan against U.S. forces. *Id.* At 521-24. For these same reasons, the Court construed the general authorization in the AUMF, in contemplating the military operations fighting in Afghanistan, contained the authority to detain traditional enemy combatants⁹ actively engaged in fighting within that Country. *Id.* At 518-19. In the current case, the Twelfth Circuit, sitting en banc, held that it is "abundantly clear that the President is

⁹ The traditional enemy combatant is well recognized and easily defined. In *Hamdi*, this Court conceptualized the enemy combatant status in the context of traditional wars *Hamdi*, 542 U.S. at 518-19; See e.g., *Geneva Convention Relative to the Treatment of Prisoners of War* arts. 3, 4, Aug. 12, 1949, 6 U.S.T. 3316, 7 U.N.T.S. 135 (differentiating between conflicts of an international character). This extends to soldiers of an enemy nation "carrying a weapon against American troops on a foreign battlefield," *Hamdi*, 542 U.S. at n.1, and to spies and saboteurs of an enemy state who unlawfully enter the United States "with the purpose of destroying war materials and utilities." *Ex parte Quirin*, 317 U.S. at 46.

authorized by the AUMF to detain enemy combatants who have taken up arms against the United States in support of a country or government that is our enemy ... and were sent by the al Qaeda organization to the United States to conduct additional terror operations here" even if residing here lawfully. R. at 13-14. This results in an expansive interpretation of the AUMF and the concept of an "enemy combatant" well beyond the tradition stated in this Court's prior decisions.

Within the framework of the Constitution, the civilian judiciary serves as a bulwark against the exertion of military authority over individuals within the domestic sphere. See *Dow v. Johnson*, 100 U.S. 158, 169 (1879) ("The established principle of every free people, is that the law shall alone govern; and to it the military must always yield."). Individual liberty is protected, because when a person residing inside the United States faces charges for which he or she is subject to imprisonment by the government, there is a presumption that the Constitution guarantees. See *Reid v. Covert*, 354 U.S. 1, 21 (1957) ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged within crimes against the United States."). The courts play a critical role as a check on executive power as well as safeguarding constitutional rights, and if the Executive were

allowed to subject lawful residents to military detention without explicit congressional authorization, the result is the ability to manipulate the civilian judicial system by threatening with military detention over those it seeks to prosecute.¹⁰ Therefore, as a matter of law, allowing the government to detain resident aliens as "enemy combatants" based solely on suspicion of terrorism is a significant expansion of traditional executive detention powers.

II. The Process Afforded To Ahmed By The District Court To Challenge His Designation As An "Enemy Combatant" Was Insufficient Under The Requirements Of The Due Process Clause Of The Fifth Amendment.

(A) The President Exceeded His Authority By Classifying Ahmed As An "Enemy Combatant" And Denying Him The Due Process Requirements Of The Fifth Amendment.

The President does not have the power to hold Ahmed for an indeterminate duration without affording him an adequate habeas corpus hearing. "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536 (citing *Youngstown* 343 U.S. at 587). See *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934) ([E]ven the war power does

¹⁰ See *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting from the denial of certiorari) ("the ability to select between military and civilian jurisdictions, is potentially destructive when, as in the present case, the government initially treats the matter as a civilian prosecution, and then switches to military detention later on because the criminal defendant has invoked legal rights which makes criminal prosecution more difficult.

not remove constitutional limitations safeguarding essential liberties."). The President "can exercise no authority whatever but that which the Constitution of the country gives him." *Ex parte Milligan*, 71 U.S. at 19. The *Hamdi* Court affirmed the President's authority under the AUMF to detain United States citizens as "enemy combatants," but only authorizes the "detention of combatants in the narrow[est] ... circumstance[s]" *Hamdi*, 542 U.S. at 509. The narrow holding in *Hamdi* pertains only to the capture of American citizens from the battlefield in armed conflict against the United States. "[T]he Article II mandate for the President to execute the law is a directive to enforce the law which Congress has written." *I.N.S. v. Chadha* 462 U.S. 919, 1000, 01 (1983) (citing *Youngstown*, 343 U.S. 579).¹¹ "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb" *Youngstown*, 343 U.S. at 635-37.

There is, of course, a difference between this case and ... the Steel Seizure Case. In ... [Youngstown] a private party was asserting a wrong to him: his property was being taken and he demanded a determination of the legality of the taking. Here ... lives and liberties ... are in jeopardy. Certainly the Constitution gives no greater protection to property than to life and liberty.

Commonwealth of Massachusetts v. Laird, 400 U.S. 886, 899

¹¹ See *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (The duty of the President to see that the laws be executed is a duty that does not ... require him to achieve more than Congress sees fit to leave within his power.)

(1970). Ahmed's incarceration was by civilian authorities from his home in East Dakota and although Ahmed is a citizen of Pakistan, the Fifth Amendment protects "all persons within the territory of the United States." *Wong Wing*, 163 U.S. at 238. See also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271

(1990). The Fifth Amendment guarantees that, "No person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. Even a State of War cannot empower the Commander in Chief to seize persons on American soil and hold them for an indeterminate time without affording them Fifth Amendment due process:

No mere order or proclamation of the President for the arrest and imprisonment of a person not in the military service, in a State removed from the scene of actual hostilities, where the courts are open and in the unobstructed exercise of their jurisdiction, can constitute due process of law, nor can it be made such by any act of Congress.

Beckwith v. Bean, 98 U.S. 266, 294 (1878). "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex*

parte Milligan, 71 U.S. at 76.¹² The President errs in his contention that Ahmed's classification as an "enemy combatant" and his incarceration by military authorities changes his legal status and lowers the burden to afford him a full and robust habeas corpus hearing guaranteed to all by the United States Constitution.¹³

The President's use of the Murphy Declaration as proof of Ahmed's terrorist affiliations and participation is not substantive and the allegations contained therein do not allow Ahmed the opportunity to refute the claims with "more persuasive evidence." "On application for a writ of habeas corpus, evidence may be taken orally or by deposition or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246 (2008). The use of hearsay is limited because "the statement may not have been made under oath; the declarant may not have been subjected to cross-examination when he made the statement; and the jury cannot observe the declarant's demeanor at the time he made the statement." *California v. Green*, 399 U.S. 149, 154 (1930).

Judicial discretion allows for hearsay when the production of

12 See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 155 (1919) (the exercise of the war powers is ... subject to the Fifth Amendment.); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 88, (1921) ([T]he mere existence of a state of war could not suspend or change ... the guaranties and limitations of the Fifth and Sixth Amendments")

13 "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. art. 1 & 9 cl. 2.

physical or testimonial evidence creates such a burden that the production of that evidence becomes impractical. In *Hamdi*, this Court held that “[h]earsay ... may [emphasis added] need to be accepted as the most reliable available evidence from the Government in such a proceeding.” *Hamdi*, 542 U.S. at 534. *Ahmed* is antithetic to *Hamdi* as the United States makes no claim that John R. Murphy is unavailable to testify, nor does it contend that there is any undue burden or national security risk preventing the production of witnesses or other physical evidence supporting the allegations against Ahmed.¹⁴ The use of hearsay requires the court to consider the private interest affected by the official action; the risk of an erroneous deprivation and probable value of additional procedural safeguards; and the burden on the government. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See, e.g., *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990); *Schall v. Martin*, 467 U.S. 253, 274-75 (1984). This Court states in *Hamdi* that the *Mathews'* test

14 “To the extent classified information is material and relevant to the petitioner's defense against the allegations, due process should require the government either to permit the petitioner to make use of the information or to abandon the attempt to impose an enemy combatant detention, similar to the principles applied in criminal cases. Although the full scope of the criminal Confrontation Clause right is not applicable, the use of hearsay evidence alone almost certainly would be inadequate to prove enemy combatant status by clear and convincing evidence.” Benjamin J. Priester, *Return Of The Great Writ: Judicial Review, Due Process, And The Detention Of Alleged Terrorists As Enemy Combatants*, 37 Rutgers L.J. 39 (2005).

"contemplates a 'judicious balancing' ... through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value,' if any, of additional or substitute procedural safeguards." *Hamdi*, 542 U.S. at 529. The district court exacerbated the risk of erroneous deprivation by allowing the use of hearsay within hearsay, which further distances the accused from the accuser and erodes the fundamental rights guaranteed to all persons by the Fifth Amendment. "The Fifth ... Amendment commands that federal and state trials ... must be conducted in accordance with due process of law. It is by this standard that I would test federal and state rules of evidence." *Dutton v. Evans*, 400 U.S. 74, 96-7 (1970). The Respondent will argue that Ahmed's habeas corpus hearing is administrative and not criminal and that the district court was correct to refuse Ahmed "procedural safeguards substantially equivalent to those of a criminal defendant." R at 9. "Reliance on the Due Process Clauses would ... subject [the] rules of evidence to constitutional scrutiny in civil and criminal trials alike. It is exceedingly rare for the common law to make admissibility of evidence turn on whether the proceeding is civil or criminal in nature." *Dutton*, 400 U.S. at 97. The Federal Rules of Evidence allow for hearsay within hearsay, but its use is limited and "is not excluded under the hearsay rule

if [emphasis added] each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed. R. Evidence 805. The failure of the government to produce any witnesses or any corroborating facts to support the hearsay contentions put forth in the Murphy declaration, or to meet any hearsay exception listed within the Federal Rules of Evidence, creates a fatal flaw in the administration of *Mathews* balancing test.

The founders saw inherent risks associated with any power granted solely to one branch of government and they designed a system of checks and balances that limits the President's power to act unilaterally.¹⁵ "Our system of government clearly is the antithesis of total military rule and the founders of this country ... were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws." *Duncan*, 327 U.S. at 322. It is the Judiciary and not the Executive branch that decides what the law is. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (It is emphatically the province and duty of the judicial department to say what the law is ...

¹⁵ It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. The Federalist No. 48, at 332 (James Madison).

If two laws conflict with each other, the courts must decide on the operation of each.) Without specific Congressional authorization or judicial confirmation, the President lacks the authority¹⁶ to limit or revoke Ahmed's right to the procedural due process afforded him by the Fifth Amendment.

(B) Under The Fifth Amendment The United States Cannot Hold Ahmed To Answer For A Capital, Or Otherwise Infamous Crime, Absent A Presentment Or Indictment By A Grand Jury.

The Fifth Amendment provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury. The definition of infamous crime evolves as our Nation grows.¹⁷ The potential penalty, not the actual punishment levied, makes a crime infamous and "imprisonment in a penitentiary ... renders a crime infamous." *United States v. Moreland*, 258 U.S. 433, 447 (1922). The United States intends to hold Ahmed as an "enemy combatant" for an indeterminate period without chance of release. "When the accused is in danger of being subjected to an infamous punishment ... he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury."

16 See *Youngstown*, 343 U.S. at 589. (The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power, and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding)

17 See *Moreland*, 258 U.S. at 451 (What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another.)

Ex Parte Wilson, 114 U.S. 417, 426 (1885). The Murphy Declaration accuses Ahmed of knowingly supporting al Qaeda, a known terrorist organization that claims the responsibility for the murder of over 3000 Americans on September 11, 2001. Knowingly supporting al Qaeda in the commission of a murderous attack classifies Ahmed's alleged crimes as "infamous",¹⁸ subjects him to a term of life imprisonment,¹⁹ and entitles him to presentment or indictment by a Grand Jury.

Respondents may contend that Ahmed's is not due the full breadth of due process protections guaranteed by the Fifth Amendment because his detention is not punitive but instead is a legitimate governmental objective intended to prevent Ahmed "from aiding al Qaeda in its efforts to attack and harm the United States." R. at 48. However, "a court must look to see if a particular restriction or condition ... is ... an incident of a legitimate nonpunitive governmental objective." *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). This Court goes on to emphasize that

18 See *Moreland*, 258 U.S. at 447 (imprisonment in a penitentiary...renders a crime infamous.)

19 Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be...imprisoned not more than 15 years...and, if the death of any person results, shall be imprisoned for any term of years or for life. 18 U.S.C. § 2339B (2009).

"Retribution and *deterrence* [emphasis added] are not legitimate nonpunitive governmental objectives." *Kennedy*, 372 U.S., at 168.

[I]t is well to remember the magnitude of the injury that pretrial detention inflicts and the departure that it marks from ordinary forms of constitutional governance. Executive power to detain an individual is the hallmark of the totalitarian state. Under our Constitution ... the Due Process Clause of the Fifth Amendment ... militate[s] against this abhorrent practice. Our historical approach eschewing detention prior to trial reflects these concerns.

United States v. Montalvo-Murillo, 495 U.S. 711, 723-24 (1990).

The United States has no plans to prosecute Ahmed but instead purport to hold him for the indefinite term of the "War on Terror" on the belief that he *may* assist al-Qaeda.

Grave public danger is said to result from what they may be expected to do If I assume that defendants are disposed to commit every opportune disloyal act ... it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is ... unprecedented in this country and ... fraught with danger of excesses and injustice

Williamson v. United States, 184 F.2d 280, 282 (1950). As such, any offering that Ahmed's detention is subject to the pre-trial discretion normally afforded the State is inconsistent with the facts and it is therefore incumbent upon the State to either "place [Ahmed] ... in a removal proceeding ... charge [him] with a criminal offense ... [or] release [him]." 8 U.S.C. § 1226a(a)(5).

The burden-shifting framework set in place by the district court eliminates the onus on the United States to present its case against Ahmed and forces Ahmed to prove his innocence. By exercising his rights under the Fifth Amendment²⁰ and remaining silent but for a general denial, the district court stripped Ahmed of his constitutional right "to be confronted with the witnesses against him, [and] to have [a] compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI.

"Petitioners in habeas corpus proceedings ... are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Boumediene v. Bush*, 476 F.3d 934, 1005 (2006) (quoting *Harris v. Nelson*, 394 U.S. 286, 298 (1969)).

Congress may replace the privilege of habeas corpus with a commensurate procedure ... [h]owever ... if a subject of Executive detention 'were subject to any substantial procedural hurdles which ma[k]e his remedy ... less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered'

Boumediene v. Bush, 476 F.3d 981, 1004 (D.C. Cir. 2007) (quoting *Sanders v. United States*, 373 U.S. 1, 14 (1963)). This court has

20 "The Fifth Amendment prevents an innocent defendant from compelling self-incriminating testimony from a guilty witness. But this invocation of the Fifth Amendment by the witness denies the accused [his] explicit Sixth Amendment right 'to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor'" Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857 (1995).

long held that, *Ei incumbit probatio qui dicit, non qui negat*²¹, the burden of proof rests on who asserts, not on who denies. The use of the Murphy Declaration without physical or testimonial evidence, coupled with the burden-shifting framework set by the district court, makes Ahmed's task of proving his own innocence virtually impossible.

The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful ... the evidentiary burden is not trivial If the evidentiary issue is a[s] serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 237 (2002). See *United States v. Williams*, 128 S.Ct. 1830, 1858 (2008) (the Government bear[s] the burden of proof); *Michigan v. Fisher*, 130 S.Ct. 546, 550 (2009) (The State bears the burden of proof on that factual issue). Absent disproving the allegations set forth in the Murphy Declaration²² the district court ostensibly convicted Ahmed and asks this Court to support a finding that

21 See *Gaines v. Relf*, 53 U.S. 472, 501 (1851) (The onus probandi [burden of proof] ... is with the complainant [and] ... [t]his rule is as strict in equity courts as in courts of law.)

22 *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (The standard of proof beyond a reasonable doubt ... 'plays a vital role' ... because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error) See *In re Winship*, 397 U.S. 358, 361, 363 (1970) ([P]roof beyond a reasonable doubt dates at least from our early years as a Nation ... The accused ... has at stake interest of immense importance ... the possibility that he may lose his liberty); See also *Hamdi*, 542 U.S. at 529 ([the] " ... the most elemental of liberty interests - the interest in being free from physical detention by one's own government." . See e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

subjects Ahmed to an indefinite period of detention with no chance to prove his innocence, confront his accusers, or have his case heard in open court.

CONCLUSION

For the foregoing reasons, this Court should find that the AUMF did not authorize the President to hold Ahmed indefinitely as an "enemy combatant" and the process afforded Ahmed by the district court to challenge his designation as an "enemy combatant", was insufficient under the requirements of the Fifth Amendment. Accordingly, the Court should reverse and remand the Circuit Court's decision.

CERTIFICATE OF SERVICE

The undersigned certifies that, on January 15, 2010, a true and correct copy of the foregoing Brief for Petitioner Burhan Uddin Ahmed was forwarded to the following counsel of record via Federal Express:

Constance Baker Motley National Moot Court Competition
c/o The American Constitution Society for Law and Policy
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Washington, DC 20005.

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APPENDIX A

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' 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.