

No. 08-11144

---

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

BURHAN UDDIN AHMED,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

---

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

---

BRIEF OF PETITIONER

---

January 15, 2010

Team No. 5930

**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?

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF JURISDICTION ..... v

STANDARD OF REVIEW ..... v

STATEMENT OF THE CASE ..... 1

I. STATEMENT OF FACTS ..... 1

II. PROCEDURAL HISTORY ..... 3

SUMMARY OF THE ARGUMENTS ..... 5

ARGUMENTS ..... 7

I. AHMED MUST EITEHR BE RELEASED, OR CHARGED IN CIVILLIAN COURT  
BECAUSE THE AUMF DOES NOT AUTHORIZE AHMED'S INDIFINITE MILITARY  
DETENTION, AND THE PRESIDENT DOES NOT HAVE THE INHERENT POWER TO  
DETAIN LEGAL RESIDENTS ..... 7

    A. Congress Did Not Authorize the President to Detain Ahmed as  
    an Enemy Combatant through the AUMF..... 8

    B. The Patriot Act Clearly and Explicitly Provides Procedures  
    for the Detention of Alien Residents Who May Be Associated With  
    Al Qaeda..... 12

    C. Without the Congressional Grant of Power, the President  
    Cannot, On His Own Constitutional Power Indefinitely Detain  
    Ahmed..... 14

II. AHMED WAS NOT AFFORDED SUFFICIENT PROCESS TO CHALLENGE HIS  
DESIGNATION AS AN ENEMY COMBATANT BECAUSE THE HEARSAY EVIDENCE DOES  
NOT PROVIDE A FAIR NOTICE OF THE FACTUAL BASIS FOR HIS  
CLASSIFICATION AND THUS DENIES HIM THE FAIR OPPORTUNITY TO REBUT  
THOSE ASSERTIONS. .... 17

    A. Reliance Upon Hearsay Evidence is Unnecessary Because the  
    Relevant Evidence Against Him is Likely Contained in a  
    Discoverable Location that is Not Overly Burdensome to Discover.

B. Requiring the Government to Provide More Reliable Evidence than the Hearsay Evidence Would Not Interfere With Military Functions Because it Would Not Distract Military Personnel Who Are Actively Involved in Conduct nor Would it Include Evidence That Would Intrude on any Sensitive Defense Secrets..... 21

C. Utilizing the Hearsay Evidence Contained in the Murphy Declaration Significantly Deprives Ahmed of Essential Liberties Because it Does Not Allow Him Proper Ability to Refute the Factual Allegations Brought Against Him..... 23

CONCLUSION ..... 25

**TABLE OF AUTHORITIES**

**United States Supreme Court Cases**

Ex Parte Endo, 323 U.S. 283 (1944) ..... 10  
Ex Parte Milligan, 71 U.S. 2 (1866) ..... 7, 16  
Ex Parte Quirin, 317 U.S. 1 (1942) ..... 10, 11  
Gregory v. Ashcroft, 360 U.S. 474 (1959) ..... 8  
Gutknecht v. United States, 396 U.S. 295 (1970) ..... 8  
Hamdan v. Rumsfeld, 548 U.S. 557 (2006) ..... 15  
Hamdi v. Rumsfeld 542 U.S. 507 (2004) ..... passim  
Matthews v. Eldridge 424 U.S. 319 (1976) ..... passim  
NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S.  
 274 (1960) ..... 14  
Preiser v. Rodriguez, 411 U.S. 475 (1973) ..... 14  
The Prize Cases, 67 U.S. 635(1862) ..... 17  
Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952) 14, 15, 16  
Zasvydas v. Davis, 533 U.S. 678 (2001) ..... 8

**United States Court of Appeals Cases**

Mutairi v. U.S., 644 F.Supp.2d 78 (2009) ..... 19

**Constitutional Provisions**

U. S. Const. Amend. V ..... 7

**Statutes**

8 U.S.C. §1126 ..... 13  
 AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001). ..... 9  
 US Patriot Act., Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001)  
 ..... 12

**STATEMENT OF JURISDICTION**

Jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1) (2006).

**STANDARD OF REVIEW**

An appellate review of a denial of a petition for habeas corpus is reviewed de novo for findings of law, and clear error for findings of fact. Colvin v. Taylor, 324 F.3d 583, 586 (8th Cir. 2003).

**STATEMENT OF THE CASE**

**I. STATEMENT OF FACTS**

Petitioner, Burhan Uddin Ahmed is currently sitting in his cell at the Army Regional Detention Center in East Dakota, where he has been for over 6 years. Ahmed is not serving a sentence for any crime he has committed, nor has any crime been charged. Rather, Ahmed has been imprisoned against his will for the past 6 years based solely on an order from President Bush.

Ahmed, a citizen of Pakistan, lawfully entered the United States with his family on September 8, 2001. (R. at 7.) Ahmed came to the United States with hopes of pursuing a doctorate in veterinary medicine from Wilson University, in Wilson, East Dakota. (R. at 6.) However, everything changed on September 11, 2001 when terrorist of Middle Eastern descent hijacked four airplanes and used them as weapons against the United States.

Congress reacted swiftly and passed the Authorization for Use of Military Force, (AUMF) allowing 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." AUMF, 115 Stat. 224. President Bush used the AUMF as authorization to take military action to remove the Taliban government in Afghanistan from power for its refusal to turn over Osama bin Laden.

Despite the great tragedy, and the ensuing hostility that untold Middle Eastern immigrants faced, Ahmed remained enrolled at Wilson University throughout fall semester, 2001. (R. at 47.) On January 3, 2002, federal agents took Ahmed into custody and held him as a material witness in connection with the 9/11 attacks. (R. at 7.) After being held without criminal charge in Wilson, East Dakota, for over ten months, the United States Attorney formally charged Ahmed with possession of counterfeit social security cards with intent to defraud. (R. at 7.) Ahmed was further charged with making a false statement to the FBI. (R. at 7.) Ahmed pled not guilty to all charges and the case was set for trial (R. at 7.)

On June 13, 2003, two days before the scheduled hearing on all of the pre-trial motions in Ahmed's case, and four days before the scheduled trial, the United States filed an ex parte motion to dismiss based on an order issued by President George W. Bush. In the order, President Bush stated that he "DETERMINED for the United States of America that" Ahmed: (1) is an enemy combatant; (2) is closely associated with al Qaeda; 3) "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism"; (4) "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda"; and (5) "represents a continuing, present, and grave danger to the national security of the United States." (R. at 7.) The President further determined that continued military detention of

Ahmed was "necessary to prevent him from aiding al Qaeda." (R. at 7.) Based on the ex parte motion and the Presidential Order, the district court dismissed the case, and the Attorney General transferred Ahmed from his custody to that of the Secretary of Defense. (R. at 7.) The Secretary of Defense then detained Ahmed in the Army Regional Consolidated Detention Facility in Souds, East Dakota with the designation of "enemy combatant." (R. at 7-8.) The United States Military has continuously held Ahmed without criminal charge or trial, and has offered no indication as to when Ahmed's detention will end. (R. at 8.)

## **II. PROCEDURAL HISTORY**

Upon his military detention, Ahmed filed a petition for writ of habeas corpus in the United States District of East Dakota under 28 U.S.C. § 2241 (R. at 8.) Ahmed asserts through his petition, that his military detention is unlawful, therefore he must either be criminally charged or released. (R. at 8.) Ahmed pleads in the alternative that he must be afforded the proper constitutional guaranteed due process to challenge the factual basis behind his designation as an enemy combatant. The United States disagreed with Ahmed's assertions and provided the district court with a hearsay document listing assertions against Ahmed made by Director of the Joint Taskforce for Combating Terrorism, John Murphy. (R. at 8.)

After reviewing the evidence, the district court decided that Ahmed could be detained as an enemy combatant, but that he must be

granted a hearing where he could challenge the factual basis of the evidence presented. (R. at 8.) The magistrate entrusted to determine the level of safeguard required under due process decided that the government must only produce credible evidence in support of the enemy combatant designation. (R. at 9.) If the government can meet that burden, then under the magistrate's guidelines, the burden would then shift to Ahmed to refute the government's assertions with more persuasive evidence. (R. at 9.) If Ahmed could meet this burden, then the government would either have to release him or offer him a full hearing with the robust safeguards granted to criminal defendants (R. at 9.)

During the hearing, the government produced the Murphy Declaration. (R. at 9.) Ahmed, however only denied the allegations and refused to present evidence on his behalf due to the unconstitutionality of the hearing. (R. at 9.) Because of his refusal, his petition for writ of habeas corpus was denied by the district court. Upon appeal to the United States Court of Appeals for the twelfth circuit, the district court decision was affirmed. (R. at 10.) Upon further request for rehearing, the circuit court vacated its panel decision and agreed to hear the case en banc. (R. at 10.) A plurality of the circuit court held that Ahmed's detention as an enemy combatant was legally valid, but that the process afforded to him did not meet the minimum standard under the Due Process clause of the Constitution. (R. at 22.)

Both Ahmed and the United States timely filed petition for certiorari to the United States Court of Appeals for the Twelfth Circuit. This case presents itself to this Honorable Court upon a grant of both parties' petitions for certiorari.

#### **SUMMARY OF THE ARGUMENTS**

Respondent seeks to have this Court disregard the Constitutional check on the President that our founding fathers saw as so central to our system of government. Respondent seeks to have this Court create the power of the President to indefinitely detain people lawfully present in the United States based solely on the President's determination of "ties to al Qaeda." Congress did not authorize such action when it enacted the Authorization for Use of Military Force, and specifically prohibited such action in the Patriot Act. This Court cannot similarly find that the President has an inherent Constitutional ability to indefinitely detain persons such as Petitioner because our founding fathers made sure install the proper checks and balances against the Executive so that he would not be able to declare himself the supreme legislator, supreme judge and supreme executive while trampling over those rights that so many have given their lives to protect. This Court stands as the last available check on the ever expanding self declared Presidential powers, and it should find that Ahmed's indefinite detention based solely on a Presidential order is quite contrary to the

Constitution and to the ordered liberty it serves to protect.

Furthermore, relying upon the hearsay evidence provided by the government in the Murphy Declaration does not provide Ahmed with sufficient process to challenge his designation as an enemy combatant. The decision to use hearsay evidence is not applicable in this case because it is not overly burdensome for the government to provide the actual evidence against Ahmed, providing this evidence will not distract from military operations or unveil important national defense secrets, and to rely on the hearsay evidence denies Ahmed the ability to refute the factual allegations brought against him. Ahmed was captured because of an ongoing FBI investigation of him. The information would not be caught up in a war zone or contained only in the minds and files of those abroad, but is in files located in the U.S. that are presumably easily discoverable. None of the evidence contains important national defense secrets because by supplying the Murphy Declaration the government has already stated everything they know and involves information from civilian officers who did the investigation. Finally, depriving Ahmed of the actual evidence erroneously deprives him of his vital liberties by barring him from refuting the factual allegations. The Murphy declaration contains vague, blanket statements and utilizing them wrongfully places a greater burden of proof on Ahmed and violates his fundamental and inalienable right to Due Process.

## ARGUMENTS

### **I. AHMED MUST EITHER BE RELEASED, OR CHARGED IN CIVILLIAN COURT BECAUSE THE AUMF DOES NOT AUTHORIZE AHMED'S INDIFINITE MILITARY DETENTION, AND THE PRESIDENT DOES NOT HAVE THE INHERENT POWER TO DETAIN LEGAL RESIDENTS**

Our founding fathers were well aware and rightfully afraid of the far-reaching military powers of the British Monarch during times of war. They realized that "the nation they were founding, be its existence short or long, would be involved in war" and "that unlimited power, wherever lodged at such a time was especially hazardous to freemen." Ex Parte Milligan, 71 U.S. 2, 125 (1866). To combat this hazard, the founding fathers carefully divided war powers between the executive and legislative branches, making sure the military powers of the executive to wage war and detain enemies were subordinate and limited to the express authority granted by the civilian Congress.

Our founding fathers further secured the rights of the people against oppression by the government through ratifying the Fifth Amendment, explicitly prohibiting the government from depriving any "person" of their "life, liberty, or property, without due process of law." U. S. Const. Amend. V. The drafters of the Constitution used the word "person" and not "citizen", therefore "the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful,

temporary, or permanent.” Zasvydas v. Davis, 533 U.S. 678, 679 (2001).

This Court has long stood by the proposition that congressional grants of power to the President that have the potential to weaken or remove constitutionally protected rights must do so explicitly and must be clearly stated. See *Ex Parte Endo*, 323 U.S. 283, 300 (1944) (“We must assume, when asked to find implied powers in a grant of legislative or executive authority, that law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used”). see also Gregory v. Ashcroft, 360 U.S. 474, 507 (1959) (“In traditionally sensitive areas ... the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision”). This clear statement requirement allows Congress to tell the Court what it actually intended to do, and as such, the court must “construe narrowly all delegated powers that curtail or dilute” any fundamental rights. Gutknecht v. United States, 396 U.S. 295, 306-07 (1970).

**A. Congress Did Not Authorize the President to Detain Ahmed as an Enemy Combatant through the AUMF.**

A statute authorizing the indefinite detention of a legal resident without charge or trial, based solely on unchallengeable allegations of “ties to al Qaeda” and suggestions of future

unplanned acts of violence, would present such serious constitutional questions that Publius would be rolling over in his grave. Thankfully, no such statute exists. Congress's Authorization for Use of Military Force merely provides the President with the power to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks 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." Pub. L. No. 107-40, 115 Stat. 224 (2001).

In the plain and clear language of the AUMF, Congress decided not to provide this Court with a clear and unmistakable message that the President has the ability to trample over the rights of legal residents through their indefinite detention as enemy combatants. Respondent cannot expect this Court to read a right violating power where one does not exist. Instead, this Court "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." Ex Parte Endo, 323 U.S. 283, 300 (1944). When it does so, this Court will find that Congress only intended to provide the President with the ability to use the military to remove the terrorist harboring Taliban government from

Afghanistan, and to effectively deal with al Qaeda operations inside Afghanistan. Hamdi v. Rumsfeld 542 U.S. 507, 519-21 (2004).

A positive ruling for Petitioner will not have the effect of overturning or modifying any of this Court's past precedent. Indeed, Hamdi v. Rumsfeld will remain unchanged. Though Hamdi and the present case seem at odds, the two actually explain the law as it currently stands quite well. In Hamdi, this Court found that the AUMF implicitly authorized the President to detain those 'enemy combatants' who were captured on the battlefield in Afghanistan after taking up arms against the United States of its allies. Id. at 518. This Court made sure to note that its holding is limited to the specific definition of "enemy combatant" that the government put forth. Id. at 517. Indeed, there is precedent that shows the essential need for the President to detain prisoners of war who are caught on the battlefield in order to prevent them from returning to the front lines. Ex Parte Quirin, 317 U.S. 1, 30 (1942) (finding the capture and detention of lawful combatants by "universal agreement and practice," are "important incident[s] of war").

Ahmed, however was not captured on the battlefield in Afghanistan, nor has he ever taken up arms against the United States while in Afghanistan. If released from military custody, he would not thereafter return to the front lines and fire upon United States soldiers, because the "foreign theatre of war" is in the Middle East, and Ahmed was captured while at his home, in the

United States, where he was found without any weapon. Ahmed clearly fails to fall under the narrow definition of "enemy combatant" a plurality of this Court put forth in its limited holding in Hamdi. Because Ahmed cannot be considered an "enemy combatant," the type the AUMF allows to be detained, he cannot be detained as one.

The Court of Appeals places a great amount of emphasis on this Court's decision from Ex Parte Quirin. However, that reliance on the precedential value of the Quirin holding are quite misplaced. Yes, this Court did find that the President had the ability to detain foreign nationals who had come onto U.S. soil to perpetrate acts of violence against the United States war machine. Id. at 38. But this Court only found that such a power existed because Congress clearly and explicitly authorized the President to do so. True, the declaration of war against Germany did not contain express authorization to create military tribunals, nor detain saboteurs. Rather, Congress decided (as it did presently) to enact a short and grave declaration of war, and follow it with legislation clearly and explicitly detailing the scope of the military engagement and the powers of the President to carry out specific tasks, like creating military tribunals for the trial of war crimes. Id. at 26-27. The analogy to the World War II Articles of War, of course, is the 2001 Uniting and Strengthen America by Providing Appropriate Tools Required To Intercept And Obstruct

Terrorism Act, better known by its acronym, the US Patriot Act.  
Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

**B. The Patriot Act Clearly and Explicitly Provides Procedures for the Detention of Alien Residents Who May Be Associated With Al Qaeda.**

Congress enacted the Patriot act just five weeks after it enacted the AUMF. Whereas the AUMF provides the President with the authority to wage war in the Middle East and abroad, the Patriot Act provides the President with the "tools" to "[i]ntercept, and [o]bstruct [t]errorism" at home. Nowhere among the President's new set of "tools" can this Court find the ability to indefinitely detain persons the President deems has ties to al Qaeda. Indeed, Congress specifically prohibited such action by entrusting the ability to detain al Qaeda operatives or supporters found within the United States to the civilian arm of the Executive, the Attorney General.

Congress clearly and explicitly allows the Attorney General to "take into custody any alien" found within the United States if the Attorney General has certified that the person is a threat to the United States, and has "reasonable grounds to believe" that such person has engaged in or is associated with terrorist activities, or any other activity that constitutes a danger to the national security of the United states. 8 U.S.C. §1126(a)(1), (3)(A), (3)(B). However, Congress specifically prohibits the indefinite

detention of said alien by requiring the Attorney General to act within seven days to either charge the alien with a criminal offense, begin removal proceedings, or else, release them. 28 U.S.C. §1126a(a) (5). If the Attorney General runs into issues with the removal proceedings (for instance, if no country will accept custody of the detained alien) then Congress has allowed the Attorney General to detain the alien for an additional six month period, after which, he must review whether the person's release will "threaten the national security of the United States or the safety of the community or any person" before an additional six month period may be ordered. 28 U.S.C. §1226a(a) (6)-(7).

Additionally, the Patriot Act provides for specific challenges to the designation as "security threat" including the right of the detained person to request a review of threat status and be provided with evidence showing why the Attorney General has made his conclusion, as well as the right to challenge the detention through habeas corpus with appellate review. 28 U.S.C. §1226(b).

This Court has long stood by maxim that when Congress has "passed a more specific act to cover [a] situation," it should govern the situation rather than a general statute which might apply. See Preiser v. Rodriguez, 411 U.S. 475, 489 (1973) see also NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274, 291-292 (1960) (when asked to extend the reach of an earlier act's vague language, this Court should rather look to the specific

language of the later Act). Therefore it is improper for this Court to try to read a specific power, especially one that overrides constitutionally guaranteed rights, into the older, vague AUMF when Congress provided detailed, specific, clear instructions to the Executive on how to treat persons associated with al Qaeda who are found within our nation's borders. See Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("It is quite impossible . . . 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.").

**C. Without the Congressional Grant of Power, the President Cannot, On His Own Constitutional Power Indefinitely Detain Ahmed**

The plurality opinion from the Court of Appeals somehow found that the President has the inherent constitutional power to detain Ahmed, yet the court failed to fully explain how it arrived at this miraculous conclusion. However, the Constitution seems to stand for the exact opposite. The Bill of Rights does not contain a clause stating "during times of war, and at the President's election, the aforementioned rights no longer exist." Rather, our founding fathers made sure that especially in times of war, the rights of all people would be protected from oppression by a tyrannical executive. This Court regularly looks to Youngstown in order to

evaluate questionable claims of expansive Executive power. See Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring).

The Youngstown case was set against the background of the Korean War and an expected steelworker strike. President Truman, claiming his wartime powers, seized control of the steel plants in order to prevent the strike, and ensure the essential wartime production of steel continued. Evaluating Truman's actions, Justice Jackson created a framework for understanding presidential powers. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635. However, when the "President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." Id. at 637. Finally, when the "President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." Id.

As was previously discussed, Congress has not authorized the President through the AUMF or the Patriot Act, the power to indefinitely detain a resident alien without charge. Therefore the President's power is at its "lowest ebb." The Commander in Chief

clause designates the President as the head of the United States armed forces, limiting his independent control only to the military (and in accordance with congressional stipulations). The President has never had the power as Commander in Chief to declare himself Supreme Chancellor and override Congress by seizing companies and imprisoning his political opponents or enemies. See, Youngstown, 343 U.S. at 643-644 (Jackson, J., concurring) ("[T]he Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.") Truly, such an image of the American President would have kept our founding fathers up at night. Rather, the powers associated to the President as Commander in Chief equate to nothing more than "the command of the [armed] forces and the conduct of [military] campaigns." Milligan 71 U.S. at 139. It is possible for the President to use military force against civilians in the case of internal insurrection when there is not time enough to gain Congress's approval, but at the earliest possible time, the President must gain the consent of Congress or else halt any military action. See The Prize Cases, 67 U.S. 635, 670 (1862). Such a limited scenario does not exist in the present case, as the President has had eight years to gain Congressional approval for his impromptu detention of persons legally present in the United States. Since the President does not have Congressional approval,

and since the President's own Article II powers cannot possibly grant him the absolute power Respondent claims, Ahmed's detention was and is illegal, and therefore, he must either be released, or charged in accordance with Due Process requirements.

**II. AHMED WAS NOT AFFORDED SUFFICIENT PROCESS TO CHALLENGE HIS DESIGNATION AS AN ENEMY COMBATANT BECAUSE THE HEARSAY EVIDENCE DOES NOT PROVIDE A FAIR NOTICE OF THE FACTUAL BASIS FOR HIS CLASSIFICATION AND THUS DENIES HIM THE FAIR OPPORTUNITY TO REBUT THOSE ASSERTIONS.**

Due process is one of the most important rights afforded prisoners in the United States. After September 11 those detained as enemy combatants presented the courts with difficult approaches to due process. The availability of evidence against the detainees varied greatly and hearsay evidence, though not generally acceptable, may be used as the most reliable available evidence. When considering whether to rely on hearsay evidence in these cases the court must balance the interest of the government to protect citizens during with the rights of those detained. This Court in Matthews v. Eldridge designed a test to balance these interests; and though not in the context of a military crisis, created a way to reconcile the competing interests and satisfy due process. Matthews v. Eldridge 424 U.S. 319 (1976). "Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected . . . the risk of an erroneous deprivation of such interest . . . and finally, the Government's interest." Id. at 12.

The Twelfth Circuit was correct in applying the rule from Hamdi v. Rumsfeld for allowing hearsay evidence to provide due process. In Hamdi the court used the balancing test from Matthews to conclude that “. . . a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” Hamdi 542 U.S at 532. These requirements allow enough room for the court to determine what type and degree of notice is fair to provide the detainee with adequate due process by equalizing the burdens of proof and providing for judicial review.

**A. Reliance Upon Hearsay Evidence is Unnecessary Because the Relevant Evidence Against Him is Likely Contained in a Discoverable Location that is Not Overly Burdensome to Discover.**

Governmental interests during times of military combat cannot go unchecked in order to avoid denying essential liberties to detainees. To balance these interests “Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts[, but] . . . courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process.” Hamdi v. Rumsfeld, 542 U.S. at 526. Relying upon hearsay evidence against a detainee alters the requirements of due process and is a decision that is left to the courts to provide leeway for certain, necessary military situations. In these situations evidence

provided by the government is not presumed accurate and authentic, rather one of the central functions of the court is to evaluate the evidence and determine whether it is "sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of clarity." Mutairi v. U.S., 644 F.Supp.2d 78, \*7 (2009) (quoting Parhat 532 F.3d at 847). As discussed in the Hamdi case, the evidence provided should be the most reliable available evidence that is not overly burdensome to discover.

The Court undertook the task of determining if and when hearsay evidence can be relied upon in the Hamdi case. In that case, the petitioner was an American citizen captured while fighting against the U.S. on a battlefield in Afghanistan. He was then turned over to the U.S. military and detained at Guantanamo Bay. Hamdi, 542 U.S. at \*4. The government argued that the court should not question the sufficiency of the hearsay evidence used against Hamdi because of the "limited institutional capabilities of courts in matters of military decision-making . . ." and furthermore that "the practical difficulties that would accompany a system of trail-like process . . . would result in a futile search for evidence buried under the rubble of war." Id. at \*14. During these combat situations gathering evidence that is more concrete than hearsay is a difficult task. In the Hamdi case, the government was correct that the courts have limited capabilities to gather this evidence

when military decision-making matters are at hand. Because certain decision-making measures may be contained only in the knowledge of those on the battlefield at the time, hearsay evidence may be used in similar cases providing the "proper constitutional balance" is struck. *Id.* This balance can only be struck upon determining that the capabilities of the court to gather that further evidence and the burden of the government in providing it are not outweighed by the interest of the due process afforded the detainee.

The government has failed to show that the hearsay evidence in this case is most reliable available evidence against Ahmed. AT the very least the government should be required to demonstrate why the limitations should be placed on normal habeas procedure to provide only hearsay evidence. Ahmed was not captured on the battlefield as Hamdi was, but rather was in his home with his family where he legally resided. The evidence against him was collected in an investigation by the FBI following the 9/11 terrorist attacks. All of this evidence was used by Murphy to make his declaration against Ahmed and everything the government knows about Ahmed is stated in that declaration. This evidence from the investigation, however, is not provided. Rather the government relies on the declaration from Murphy. While the government did the investigation during a time of military combat, the evidence is not likely "buried under the rubble of war" but contained in the files collected during the investigation. The witnesses against

Ahmed are civilians who are likely in the United States and could therefore provide their evidence. This is not the situation the court dealt with in Hamdi where hearsay provided the most reliable evidence available without over-burdening the government. The evidence used by Murphy to create his declaration is presumably available through minimal discovery and to deny Ahmed this discovery denies the very principles the U.S. military fights for abroad.

**B. Requiring the Government to Provide More Reliable Evidence than the Hearsay Evidence Would Not Interfere With Military Functions Because it Would Not Distract Military Personnel Who Are Actively Involved in Conduct nor Would it Include Evidence That Would Intrude on any Sensitive Defense Secrets.**

The practical difficulties the Hamdi case, which allowed the hearsay evidence to be used against him, arose because he was captured on the battlefield in Afghanistan. To gather further evidence than what was provided in Mobb's declaration would have to come from military personnel still in the field who may be "unnecessarily and dangerously distracted by litigation half a world away" Id. at \*14. The court in Hamdi reasoned that gathering this evidence tipped the balance too far from government interests to those of the detainee and could possibly have dire consequences for the efforts made abroad. Further, the investigation into this evidence could delve into important military secrets that could significantly hinder the effectiveness of the military. Hamdi's capture was part of a specific military operation during a war and

the evidence against him likely contained important secrets about the military operations used and to uncover those secrets could have costly wartime effects both for the possibility of victory and for the lives of the military personnel involved.

Ahmed's case does not provide these concerns since he was not captured by the military on a foreign battlefield. Unlike Hamdi, Ahmed was legally in the United States and only detained because of information obtained through an investigation by U.S. officials. The witnesses against him would not be military personnel in a far away land who would be distracted from their duties of war by providing this evidence. They would be the FBI agents that performed the investigation. Furthermore, retrieval of those records would not likely reveal important defense secrets since, though a product of national defense efforts; they do not contain the secrets of the methods of retrieval or secrets of national defense efforts. The evidence against him would be "contained in the records of the civilian officials that investigated him." R. at 27. By supplying the Murphy declaration the government already stated what they know, so no secrets are going to come from providing the evidence which has already been gathered. These are not key military operations used for seeking out enemies on a battlefield or documents expressing homeland national defense strategies; they are important details needed by Ahmed to provide a true rebuttal to the factual allegations brought against him.

**C. Utilizing the Hearsay Evidence Contained in the Murphy Declaration Significantly Deprives Ahmed of Essential Liberties Because it Does Not Allow Him Proper Ability to Refute the Factual Allegations Brought Against Him.**

It is a fundamental right of due process to be able to rebut the factual allegations brought by the opposition. The commitment to due process is most severely tested during these times of conflict “and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” Hamdi, 542 U.S. at \* 14. In order to fully provide for this right the court must decide whether the evidence brought against the detainee meets that balancing test. Using hearsay evidence may be appropriate in cases such as this, as long as the “risk of erroneous deprivation of the private interest if the process were reduced” is not substantially higher than the “probable value, if any, of additional or substitute procedural safeguards.” *Id.* at \*13 (quoting Matthews v. Eldridge, 424 U.S. 319). The Supreme Court designed this important balancing test for cases very similar to this one to reconcile the important interests of both parties. In the Hamdi case, the court concluded that due process requires that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” Hamdi, 542 U.S. 507 at \*15. Using the hearsay evidence may allow the interests to be balanced

so that the Government is not significantly undermined in its efforts while providing the detainee with the most reliable evidence available. If this is the case the evidence can meet the notification requirement and therefore provide a fair opportunity for rebuttal. “. . .a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the government’s return.” Id. at \*18.

The hearsay evidence contained in the Murphy declaration has not been shown to be the only, or even most reliable evidence the government has against Ahmed. Because the factual allegations against him are only those of hearsay and other evidence is available, it denies Ahmed the important ability for rebuttal. Without important evidence the Murphy Declaration utilized to make its statements; such as the forensic examination of his laptop computer and the telephone records, Ahmed is at a great disadvantage for proving the evidence wrong. “The government has failed to show that it would be unable to produce non-hearsay evidence without unduly burdening its interests, or that a relaxed evidentiary standard was necessary in light of the specific facts of this case.” R. at 24. Allowing the hearsay evidence in every case simply because he was determined an enemy combatant leaves open the possibility for people legally residing in the United

States to be arrested and denied the opportunity to fully be heard simply because of the status afforded them by a government determination. "The right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." Matthews v. Eldridge, 424 U.S. at \*11. Ahmed is not given the full opportunity to provide a complete challenge to his designation as an enemy combatant without the evidence used by the government to make that designation. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Id. at \*11. Without having proper evidence brought against him makes it impossible for Ahmed to rebut his opponents and therefore denies him this fundamental right to be heard. This far from provides him the opportunity to be heard in a meaningful manner, therefore denying him the essential right of Due Process.

### **CONCLUSION**

As Congress has not clearly and unmistakably granted the President the power to indefinitely detain Ahmed, and because the President does not have the inherent authority as Commander in Chief, Ahmed's continued indefinite detention is illegal. Additionally,

WHEREFORE, Petitioner respectfully asks this Honorable Court to REVERSE the decision of the Twelfth Circuit in relation the

legality of Ahmed's indefinite detention, and GRANT his petition of habeas corpus, requiring either his release or detention on criminal charges. In the alternative, should this Court find his detention legal, Petitioner respectfully asks this Honorable Court to AFFIRM the Twelfth Circuit's finding in relation to the second issue, that Ahmed's right to Due Process has been violated, and to REMAND the case for a hearing not inconsistent with this Court's determination of the proper Due Process requirements.

Respectfully Submitted,

Team 5930

Counsel for Petitioner

January 15, 2010