

SUPREME COURT OF THE UNITED STATES

No. 08-11144

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BURHAN UDDIN AHMED,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for  
the Twelfth Circuit

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BRIEF FOR PETITIONER

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Team 6258

## QUESTIONS PRESENTED

- I. Did the district court err in finding that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes the seizure and indefinite military detention of a person lawfully residing in the United States without criminal charge or trial, based only on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities, and did it err in finding that the Constitution allows such a detention?
  
- II. Did the district court err in providing insufficient process under the requirements of the Fifth Amendment for Ahmed to challenge his designation as an "enemy combatant"?

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### **BASIS FOR JURISDICTION**

This honorable court has jurisdiction to hear this action arising under the Authorization for Use of Military Force (AUMF) and the Fifth Amendment of the United States Constitution pursuant to 28 U.S.C. §1331, which provides that Federal courts shall have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."

### **PROCEEDINGS BELOW**

After the government's June 13, 2003 motion to dismiss and Ahmed's transfer to military custody, Ahmed filed a petition for a writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241 to secure his release from military detention. [R. 8] The petition argued that the court should either find that Ahmed's detention as an enemy combatant was unlawful and that the government must either file criminal charges against him or release him, or alternatively, that Ahmed must be afforded a hearing to challenge the factual basis for his designation as an enemy combatant. Id. The government countered with the claim that Ahmed is an al Qaeda affiliate that the President has statutory and Constitutional authority to detain and that he was given adequate process to challenge his detention. Id. The government provided only a declaration based on hearsay from John R. Murphy (Murphy Declaration), the Director of the Joint

Task Force for Combating Terrorism, merely asserting Ahmed's involvement with al Qaeda. Id. In spite of this meager evidence, the district court agreed that Ahmed could be detained as an enemy combatant, but found that he was entitled to challenge the factual basis of his detention at a hearing. [R. 9] The district court sent the case to a magistrate judge to determine the process that Ahmed must be afforded. Id.

Although the circumstances of Ahmed's capture were remarkably similar to those of a criminal defendant, the magistrate judge rejected Ahmed's argument that he had a right to procedural safeguards substantially equivalent to those criminal defendants receive. Id. Instead, the magistrate judge rigidly applied the framework of Hamdi v. Rumsfeld to determine that the government must only provide Ahmed with notice of the factual basis of his detention, and that if the government could produce credible evidence supporting his designation as an enemy combatant, the burden would shift to Ahmed to refute this designation with more persuasive evidence. Id. If Ahmed could produce such evidence, the government must either release him or agree to a full adversarial hearing with more robust procedural safeguards. Id. Within the framework provided by these procedures, the magistrate judge considered the hearsay Murphy Declaration, concluding that it provided Ahmed with adequate notice of the factual basis to require the burden to shift to

Ahmed. Id. The magistrate judge allowed Ahmed 60 days to present rebuttal evidence. Id. Without adequate means to rebut such hearsay, Ahmed responded with a general denial that he was an enemy combatant. [R. 9-10] He insisted that the procedures adopted by the magistrate judge were unconstitutional, and that he should not be forced to prove his own innocence. Id. Even though Ahmed could not make a meaningful rebuttal, the magistrate judge recommended that his petition for a writ of habeas corpus be dismissed because he did not produce evidence to rebut the Government's hearsay. Id. The district court agreed, and Ahmed's petition was dismissed. Id.

Ahmed appealed the district court's decision dismissing his habeas petition, and a panel of Twelfth Circuit Court of Appeals affirmed the district court's dismissal. Id. Ahmed's moved for rehearing, and the appellate court voted to vacate the panel opinion and hear the case en banc. Id. The court affirmed the President's authority to designate him an enemy combatant and indefinitely detain him, but held that the procedures that the district court afforded him did not provide him a meaningful opportunity to contest his enemy combatant status. Ahmed petitioned for Writ of Certiorari to the Supreme Court of the United States, and the Court granted Certiorari on October 2, 2009. [R. 1]

**CONSTITUTIONAL PROVISION**

**U.S. Const. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**STATUTORY PROVISIONS**

**28 U.S.C §2246**

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. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

**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.

## STATEMENT OF THE FACTS

On September 8, 2001, appellant Burhan Uddin Ahmed arrived in the United States with his family eager to begin a program veterinary medicine at Wilson University in Wilson, East Dakota. [R. 7] Days later on September 11, 2001, members of the rogue terrorist group al Qaeda seized commercial airplanes and used them as guided missiles to attack well-known targets in the United States, killing nearly 3,000 people. [R. 6] Amid the national panic that followed, Congress responded by passing a resolution empowering 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. 6]

By January 3, 2002, a fearful national mood amenable to the profiling of Arab Americans led federal agents to arrest Ahmed in Wilson in connection with the government's investigation of the September 11 attacks. [R. 7] In November 2002, the government charged Ahmed in the District of East Dakota with possession of counterfeit Social Security cards with the intent to defraud and in January 2003, the government further charged Ahmed with making false statements to the FBI. Id. Ahmed pled not guilty to all charges. Id. Before the scheduled July 2003

trial date, the government filed an ex parte motion to dismiss the indictment on June 13, 2003, based on a presidential order stating that the President had determined, inter alia, that Ahmed was an enemy combatant requiring detention by the military. Id.

The District of East Dakota granted the government's motion to dismiss the criminal charges against Ahmed, and Ahmed was transferred to the Army Regional Consolidated Detention Facility. [R. 7-8] Since that time, the military has held Ahmed in custody as an enemy combatant without charge or trial. [R. 8] The government has given Ahmed no indication as to when his detention will end. Id.

## SUMMARY OF THE ARGUMENT

The President of the United States had no authority to detain the defendant Mr. Ahmed. First, the President did not have authority under the Authorization for Use of Military Force (AUMF) to detain the defendant Mr. Ahmed as an enemy combatant. In order to detain a person under the AUMF, the person must properly be designated an enemy combatant of the United States. In this case, the defendant Mr. Ahmed could not justifiably be deemed an enemy combatant because he did not fight against United States forces in a theatre of military operations.

The President furthermore did not have inherent authority granted by the Constitution to detain the defendant Mr. Ahmed as an enemy combatant. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court established the framework through which to evaluate claims of Presidential power. Under this framework, the President's power is at its weakest because he has taken action incompatible with the will of Congress. As such, the President exercised excessive and unconstitutional power by militarily detaining Mr. Ahmed for an indefinite amount of time without charge or trial.

Applying the balancing test of Mathews v. Eldridge to the due process question, the facts of Ahmed's case weigh in favor of giving him greater process than Hamdi received. While

Ahmed's essential liberty interests are the same as Hamdi's, government's specific interests in affording Ahmed less process are not as great as in Hamdi because the location of capture and the evidence attendant to it do not impose significant burdens on the Government's production of more than hearsay evidence. Ahmed's demonstrated peaceable activity in the United States for several months also increase the risk of an erroneous deprivation of his liberty to a greater degree than in the Hamdi case.

Due to these Mathews factors weighing more heavily in favor Ahmed than Hamdi, the Court should not consider mere hearsay sufficient evidence from the Government. Given the less critical Government interests at stake and decreased burden of more reliable evidence, such evidence unacceptably undermines Ahmed's fair opportunity to rebut the Government's factual assertions. Ahmed suggests that either normal habeas evidentiary standards or, at the very minimum, affidavits subject to his interrogatories are necessary to strike the constitutionally adequate balance of due process in the instant case.

## ARGUMENT

### I. THE PRESIDENT OF THE UNITED STATES HAD NO AUTHORITY TO DETAIN THE DEFENDANT MR. AHMED AS AN ENEMY COMBATANT.

The Due Process Clause of 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; see also id. amend. XIV, § 1. The amendment applies to all "person[s]," extending its protection to all lawfully admitted people living within the United States. See Wong Wing v. United States, 163 U.S. 228, 238 (1896). "Freedom from . . . government custody, detention, or other forms of physical restraint . . . lies at the heart of the liberty that [the Due Process] Clause protects." Zadvydas v. Davis, 533 U.S. 678, 690 (2001). While certain exceptions to this general rule have been established by the Supreme Court, our constitutional tradition shuns the kind of permanent detention without charge or trial to which the defendant Mr. Ahmed has been subjected.

#### **A. The President of the United States did not have authority under the Authorization for Use of Military Force to detain the defendant Mr. Ahmed as an enemy combatant.**

The President of the United States unjustifiably determined that Mr. Ahmed was an enemy combatant and thus could be detained indefinitely under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF). The President may only invoke the AUMF as authorization for military detention

if "it is sufficiently clear that the individual is, in fact, an enemy combatant." Hamdi v. Rumsfeld, 542 U.S. 507, 523 (2004). In order to be justifiably labeled an enemy combatant, an individual must fight against United States forces in a theatre of military operations, bearing arms against the United States on behalf of an enemy nation. Hamdi, 542 U.S. at 518-520.

The only charges the federal government even attempted to bring against Mr. Ahmed were possession of counterfeit Social Security cards with the intent to defraud and making a false statement to the FBI. Neither of these charges or the events with which they are connected could, by any stretch of the imagination, support a determination that Mr. Ahmed is an enemy combatant. The government also presented the Murphy Declaration purporting to detail Mr. Ahmed's involvement with al Qaeda. First, this document contains hearsay statements and thus is unreliable. Second, even if the statements in the document contain some element of truth, they do not establish that Mr. Ahmed is an "enemy combatant." At no point do any of the statements contained in the Declaration detail any instance in which Mr. Ahmed took up arms against the United States in a theatre of war.

The Court of Appeals and the government rely on three cases in arguing that the AUMF granted the President power to detain

Mr. Ahmed as an enemy combatant. In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), this Court upheld the President's power under the AUMF to indefinitely detain an American citizen captured while fighting with the Taliban against United States forces in Afghanistan. Hamdi, 542 U.S. at 518-522. In that case, the government presented evidence justifying the defendant Hamdi's military detention. He "affiliated with a Taliban military unit and received weapons training," Hamdi, 542 U.S. at 510, and "engaged in armed conflict against the United States" in Afghanistan. Hamdi, 542 U.S. at 516. Furthermore, Hamdi was captured by U.S. troops on the battlefield, and he surrendered as a soldier upon being caught. Hamdi, 542 U.S. at 513. Thus the capture and subsequent detention of Hamdi was justified, and distinguishable from the unjustified detention of the defendant Mr. Ahmed, because Hamdi bore arms against the United States in a war zone.

Notably, the AUMF does not explicitly provide for detention of enemy combatants. The Hamdi Court concluded, however, that the facts of the case warranted military detention. The Court noted that detention "to prevent a combatant's return to the battlefield is a fundamental incident of waging war . . . ." Hamdi, 542 U.S. at 519. In "the narrow circumstances considered [in the Hamdi case]," id., the President was justified in using

"necessary and appropriate force," AUMF. The narrow circumstances alluded to by this Court include only individuals who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." Hamdi, 542 U.S. at 516. Mr. Ahmed does not fit into the narrow category of individuals deserving indefinite military detention without the possibility of criminal charge or trial.

The AUMF does not authorize military detention where the "practical circumstances" of the case at hand differ from circumstances ruled by the law of war. Hamdi, 542 U.S. at 521. Mr. Ahmed was not apprehended in a combat situation. He was not captured on the battlefield, near a conflict zone. He was arrested for alleged acts that bespeak relatively ordinary criminality. The government, in seeking to justify its excessive police power under the AUMF, goes too far and exercises too much power. Allowing the President to militarily detain ordinary civilians who may have committed ordinary criminal offenses and whom the government may suspect have ties to dissent groups, no matter how tenuous, simply grants the Executive Branch with too much power. The AUMF was intended to be invoked in military situations to detain war criminals apprehended on the battlefield, not to enable the government to

hold ordinary civilians in custody without having to charge those civilians with crimes or take them to trial.

An individual may only be labeled as an enemy combatant when that individual affiliates during a time of war with the "military arm of the enemy government." Ex parte Quirin, 317 U.S. 1 (1942) (classifying a Nazi claiming American citizenship as an enemy combatant because he "associated . . . with the military arm of the enemy government, and with its aid, guidance, and direction enter[ed] this country bent on hostile acts"); Hamdi, 542 U.S. at 519; Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005) (classifying a Taliban militant as an enemy combatant "within the meaning of the laws of war" who "took up arms against United States forces . . . the same way and to the same extent as did Hamdi"). Civilians who lawfully are residing in the United States, however, may not be detained indefinitely under the AUMF, even if they are part of "secret enemy organizations" that want to "overthrow the Government." Ex parte Milligan, 71 U.S. 2, 6 (1866) (stating that civilian defendant, though having committed "an enormous crime" during a "period of war" and at a place "within . . . the theatre of military operations," must be tried in a civilian court rather than detained militarily); see also Hamdi, 542, U.S. at 522 (postulating that "[h]ad [the defendant] Milligan been captured

while he was assisting . . . soldiers by carrying a rifle against [opposing] troops on a . . . battlefield, the holding the Court might well have been different").

**B. The President of the United States did not have inherent authority granted by the Constitution to detain the defendant Mr. Ahmed as an enemy combatant.**

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), this Court established the framework through which claims of Presidential power are evaluated. "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." Youngstown, 343 U.S. at 635 (Jackson, J., concurring). "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 it is distribution is uncertain." Id. at 637. Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." Id. Thus, the "express or implied will of Congress" must be determined in order to evaluate a claim of presidential power to militarily detain lawful residents of the United States under authority of the Constitution.

The government argues that the President's power is at its greatest in this case under the Youngstown framework because he acted to detain Mr. Ahmed with congressional authorization under the AUMF. But the AUMF, as established above, does not explicitly or implicitly authorize military detention of a civilian, lawful resident such as Mr. Ahmed. Even if the AUMF could be interpreted legitimately to bear upon this case, Congress passed another statute specifically addressing the President's power to detain "enemy aliens." See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Patriot Act).

The Patriot Act provides the President with ample power to deal with "terrorist aliens." Under the Act, the Attorney General may detain any alien whom he "has reasonable grounds to believe" (1) "seeks to enter the United States" to "violate any law of the United States relating to espionage or sabotage" or to use "force, violence, or other unlawful means" in opposition to the government of the United States; (2) "has engaged in a terrorist activity"; or (3) is "likely to engage after entry in any terrorist activity," has "incited terrorist activity"; or (3) is "likely to engage after entry in any terrorist activity," has "incited terrorist activity," is a "representative" or

"member" of a "terrorist organization," is a "representative" of a "group that endorses or spouses terrorist activity," or "has received military-type training" from a terrorist organization. Patriot Act § 412(a). The Attorney General may also detain any alien who "is engaged in any other activity that endangers the national security of the United States." Id. While this detention power is broad, Congress also imposed limitations on the length of the detention of such aliens within the United States. Under the Act, "indefinite detention" is prohibited. Id. The maximum amount of time a detainee may be kept in detention is six months. Id. Through the Patriot Act, therefore, Congress established the Executive Branch's power to detain residents of the United States whom it suspects are involved with terrorist organizations. Thus, while the law of the United States provides a method by which the President may detain Mr. Ahmed, that law does not allow the President to detain Mr. Ahmed indefinitely.

Since Congress has clearly established the means by which the Executive Branch may detain Mr. Ahmed, and since the President's actions in detaining Mr. Ahmed are incompatible with those means, the President's power "is at its lowest ebb." Youngstown, 343 U.S. at 637. In a scenario such as this, the President may "rely only upon his own constitutional powers

minus any constitutional powers of Congress over the matter.”

Id. To allow the President the inherent power in this situation to detain indefinitely Mr. Ahmed without charging him or taking him to trial would be to allow the President excessive power. Indeed, with this broad power, the President would be able to detain any lawful resident who was a member of a dissident group that espoused unpopular views or believes that might be deemed antisocial.

II. THE DISTRICT COURT ERRED IN PROVIDING INSUFFICIENT PROCESS UNDER THE REQUIREMENTS OF THE FIFTH AMENDMENT FOR AHMED TO CHALLENGE HIS DESIGNATION AS AN “ENEMY COMBATANT.”

This Court has long emphasized that due process “negates any concept of inflexible procedures universally applicable to every imaginable situation” and that due process is not a “technical conception with a fixed content unrelated to time, place and circumstances.” Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961).

**A. The Court must use the balancing test of Mathews v. Eldridge to weigh the factors influencing the procedure due to Ahmed.**

The balancing test framework established in Mathews v. Eldridge is the primary framework for analyzing questions of Constitutional due process. 424 U.S. 319 (1976). This test weighs three factors: “(1) the private interest that will be

affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail." Wilkinson v. Austin, 545 U.S. 209, 211 (2005). Applying each of these factor's to Ahmed's factual circumstances, the appropriate Constitutional balance weights in Ahmed's favor.

1. Ahmed has core liberty interests at stake.

Ahmed's private interest is, like that of Hamdi, "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." Hamdi, at 529 (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). In the United States, being detaining is the "carefully limited exception" to the norm of bodily liberty. United States v. Salerno, 481 U.S. 739 (1987). Such liberty has been recognized as being a core Due Process interest. Foucha, at 80.

2. The Government's interests in affording Ahmed less process than normal habeas corpus proceedings are less critical than in the context of overseas military operations.

While the government has an interest in detaining Ahmed for the protection of national security, the specific factual circumstances associated with particular cases also weigh into the evaluation of this interest in relation to proposed procedures. Among such possible circumstances are whether litigation is an unnecessary and dangerous distraction for military officers in a conflict significantly far away, whether discovery intrudes into sensitive national defense secrets, or whether evidence may have been lost to the destruction of war. Hamdi, at 531-532.

The circumstances of Ahmed's capture on U.S. soil away from a combat zone lessens the burden of the government in providing enhanced procedures. The administrative and financial cost of providing non-hearsay evidence against Ahmed is much less where the evidence must not be obtain from far-flung and inhospitable locales and via the interruption of ongoing military operations.

3. The risk of erroneous deprivation is higher in the instant case than Hamdi.

The risk of erroneous deprivation of Ahmed's liberty interests is quite high. Ahmed not arrested in a combat zone, but more importantly he resided peaceably in the United States for four months pursuing a degree in veterinary medicine before being arrested, demonstrating a decreased risk of being an enemy

combatant by his personal conduct. This demonstrated peaceable activity is unlike even a case in which the suspect was arrested immediately after arriving from Pakistan. Rumsfeld v. Padilla, 542 U.S. 426, 430-431 (2004) (describing the circumstances of Padilla's capture). The objective circumstances of Ahmed's capture are little different from that of criminal defendants who happen to have been outside of the United States several months before their arrest.

Applying the Mathews test straightforwardly, then, the balance of factors weigh in favor of Ahmed's right to greater process.

**B. The Hamdi framework applied the Mathews test to the specific factual circumstances of Hamdi's case to allow hearsay evidence, and the frame work may be adapted to other factual contexts to require higher evidentiary standards.**

The Court in Hamdi weighed the Mathews factors and arrived at a framework appropriate to the facts of Hamdi's case for striking the Constitutional balance necessary to afford him due process. It determined 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, at 533. The critical prong of this framework for the instant case is the fair opportunity to

rebut the Government's factual assertions.

1. Hearsay evidence was sufficient in Hamdi only due to the burden that more reliable evidence would have placed on the Government under the circumstances.

The Court acknowledged that the "exigencies of the circumstances" may demand alleviation of an uncommon burden to the Executive, and for this reason hearsay "may need to be accepted at the most reliable evidence from the Government" in making its factual assertions. Id., at 533-534. The Court did not, however, propose any general test to determine when such hearsay-permitting exigencies are present.

The Federal Rules of Evidence provide a general rule against the admissibility of hearsay. Fed. R. Evid. 802. Rule 802 codifies a long-standing skeptical disposition of courts towards hearsay evidence, due to the "general consideration that it is not upon oath; that the party affected by it has no opportunity of cross-examination; that it often supposes better evidence behind; that it is peculiarly liable to be obtained by fraudulent contrivances; and above all, that it is exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character." Ellicott v. Pearl, 35 U.S. 412, 436 (1836). Thus, hearsay evidence by its very nature is difficult, and sometimes impossible, to rebut. Nicholas G. Green, A "Blank Check": Judicial Review and the War Powers in Hamdi v. Rumsfeld,

56 S.C. L. Rev. 581, 601-602 (2005). Such evidence, then, compromises a detainee's opportunity to rebut the Government's factual assertions and thus undermines a fundamental prong of the Hamdi framework.

The Hamdi Court's decision to admit hearsay illustrates that the circumstances presented by the facts of Hamdi's case implied that proceedings presented an uncommon burden to the executive and thus must given more deference to the Government's assertions. Nevertheless, the Court declined to adopt the Government's proposed process that gave no opportunity rebut the Government's assertions, and at least afforded Ahmed some opportunity to rebut the Government's assertions. Hamdi, at 532-533. That the opportunity to rebut the Government's hearsay evidence was deemed fair in Hamdi's case only shows how weighty the Government's interests were that case. Always in the background of the Hamdi framework is the Mathews balancing test at work.

2. The Government's evidentiary burden in the present case is higher under Mathews standards.

This Court may then infer that requiring heightened evidentiary standards to provide a detainee with a fairer opportunity for rebuttal where the Government's are not as weighty is the appropriate means by which to strike the Constitutional balance in other cases, such as Ahmed's. The

Hamdi framework may be flexibly applied to various factual circumstances, in keeping with long-established jurisprudence on due process. McElroy, at 895.

The Murphy Declaration in the instant case is not substantially different from the Mobbs Declaration in Hamdi in its unsupported contentions. Hamdi, at 512-513. Hence, if this court should hold that a higher burden of production is necessary in the case of Hamdi, more evidence than the Murphy Declaration is necessary to afford Ahmed a fair opportunity to rebut the Government's assertions.

Under normal habeas corpus procedure, "evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." 28 U.S.C. §2246. Should affidavits be admitted, either party has "the right to propound written interrogatories to the affiants, or to file answering affidavits." Id. This right to propound interrogatories to affiants in the case of admitted affidavits is a critical aspect of the ability to rebut any assertions the Government may make.

This Court may find that leaving the admissibility of affidavits to the discretion of the judge is appropriately flexible and hence afford Ahmed the full procedural protections of §2246. However, if it finds that the government's interests

are sufficiently weighty in the instant case, an appropriate compromise between the Government's requirements in Hamdi and the demands of normal habeas procedure is to simply remove the judge's discretion over the admission of affidavits and consider affidavits sufficient evidence. The cost to the Government of providing an affidavit subject to interrogatories is not significantly greater than the cost of producing a declaration, and is not significantly more likely to result in intrusions into secrets of national defense than required for an equitable outcome for a detainee.

Indeed, the Court may determine that affidavits may be the most reliable available evidence that is not excessively burdensome to the Government in the instant case. The Court of Appeals' demand for the Government to present the "most reliable available evidence" is thereby an adequate application of Mathews balancing test, and an adaptation of the Hamdi framework to a broader class of cases. [R. 24] The standard of the Court of Appeals should be affirmed.

**CONCLUSION**

For the preceding reasons, Petitioner respectfully requests that this Honorable Court REVERSE in part and AFFIRM in part the judgment of the United States Court of Appeals for the Twelfth Circuit and grant Petitioner all other relief that is just and equitable.

Respectfully submitted,

Burhan Uddin Ahmed

By his attorneys

Team 6258