

**IN THE**  
**Supreme Court of the United States**

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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*

**BRIEF FOR PETITIONER**  
**TEAM NUMBER 6886**

THE AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY  
2010 CONSTANCE BAKER MOTLEY NATIONAL MOOT COURT COMPETITION

**QUESTIONS PRESENTED**

- I. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes, and if so whether the Constitution allows, the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based solely on the government's assertions that the detainee conspired with al Qaeda to engage in terrorist activities?
  
- II. Whether the process afforded to Mr. Ahmed by the district court to challenge the President's designation of him as an "enemy combatant" was sufficient under the requirements of the Fifth Amendment despite the fact that the government did not face the same burden in prosecuting Mr. Ahmed as it faced in *Hamdi v. Rumsfeld*?

**TABLE OF CONTENTS**

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

OPINION BELOW..... vi

JURISDICTIONAL STATEMENT..... vi

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES.... vi

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT..... 4

ARGUMENT..... 7

    I. THE PRESIDENT HAS NOT BEEN AUTHORIZED BY CONGRESS AND DOES NOT HAVE INHERENT CONSTITUTIONAL AUTHORITY TO DECLARE MR. AHMED, A CIVILIAN, TO BE AN ENEMY COMBATANT AND, ON THE BASIS OF SUCH CLASSIFICATION, INDEFINITELY DETAIN HIM..... 7

        A. The AUMF does not authorize the President to detain Mr. Ahmed because Mr. Ahmed is not a combatant according to precedent and the international law of war. .... 7

        B. The AUMF does not authorize the President to detain Mr. Ahmed because his detention is neither necessary nor appropriate to prevent his return to the battlefield. .... 14

        C. The President does not have the inherent authority under the Constitution to detain Mr. Ahmed as an enemy combatant. 18

    II. MR. AHMED CANNOT BE DETAINED INDEFINITELY WITHOUT CHARGE, A TRIAL, OR MEANINGFUL HABEAS REVIEW..... 21

        A. The *Hamdi* burden-shifting framework does not adequately provide due process for alleged enemy combatants arrested on U.S. soil because the facts and circumstances demonstrate the Executive is procedurally burdened no more than in a normal criminal trial ..... 21

        B. The Government’s Indefinite Detention of Mr. Ahmed without Charge and on the basis of the Murphy Declaration, which is not the most reliable evidence available, is a fundamental violation of Mr. Ahmed’s Due Process. .... 26

CONCLUSION..... 30

**TABLE OF AUTHORITIES**CASES

<i>Carey v. Piphus</i> , 435 U.S. 247 (1978) .....	29
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973) .....	29
<i>Dennis v. United States</i> , 341 U.S. 494 (1951) .....	23
<i>Ex parte Milligan</i> , 71 U.S. 2 (1866) .....	9, 22
<i>Ex parte Quirin</i> , 317 U.S. 1 (1942) .....	8, 11
<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992) .....	21
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006) .....	20
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004) .....	<i>passim</i>
<i>Hamlily v. Obama</i> , 616 F. Supp. 2d 63, 76 (D.D.C. 2009) .....	12
<i>Jones v. United States</i> , 463 U.S. 354 (1983) .....	27
<i>Kiyemba v. Obama</i> , 555 F.3d 1022 (D.C. Cir. 2009) .....	12
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944) .....	23
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976) .....	21, 22
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972) .....	21
<i>Public Comm. Against Torture in Isr. v. Israel</i> , 46 I.L.M. 375, 391-392 (Isr. S. Ct. 2007) .....	12
<i>United States v. Salerno</i> , 481 U.S. 739 (1987) .....	27
<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> , 343 U.S. 579, 635 (1952) .....	19, 20, 23
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001) .....	27, 28
<i>Zinerman v. Burch</i> , 494 U.S. 113 (1990) .....	27

STATUTES

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) .....	7
Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3(1), 6 U.S.T. 3316 .....	11
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 § 412(a), Pub. L. No. 107-56, 115 Stat. 272 .....	16, 19

OTHER AUTHORITIES

Curtis Bradley & Jack Goldsmith, <i>Congressional Authorization and the War on Terrorism</i> , 118 HARV. L. REV. 2047 (2005) ..	11, 12, 13
NILES MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) .....	13
Yasmin Naqvi, <i>Doubtful Prisoner-of-War Status</i> , 847 INT'L REV. RED CROSS 571, 572 (2002) .....	15

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V .....	21
U.S. CONST. art. II, § 2, cl. 1 .....	18

**OPINION BELOW**

The opinion of the Twelfth Circuit is reprinted at Record 5.

**JURISDICTIONAL STATEMENT**

The district court had jurisdiction over this civil habeas corpus proceeding pursuant to 28 U.S.C. § 2241. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(b). Petitioners filed their petition for certiorari, which this Court granted on October 2, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES**

1. Article II, § 2, cl. 1 of the United States Constitution provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

2. The Fifth Amendment, U.S. CONST. amend. V, provides:

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.

3. The Authorization for the Use of Military Force, S.J. Res. 23, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001)p provides:

[T]he 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.

4. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 § 412(a), Pub. L. No. 107-56, 115 Stat. 272, provides:

(1) CUSTODY. The Attorney General shall take into custody any alien who is certified under paragraph (3)

(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.

5. The Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3(1), 6 U.S.T. 3316 (entered into force Feb. 2, 1956) provides:

(1) Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

. . .

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

**STATEMENT OF THE CASE**

In September 2001, Burhan Uddin Ahmed lawfully entered the United States to pursue a doctorate degree in veterinary medicine at Wilson University in Wilson, East Dakota. Record 7. Four months later, while still a student, Mr. Ahmed was detained as a material witness in the government's investigation of the 9/11 attacks and held in Wilson. Record 7. In November 2002 in the District of East Dakota, the government charged Mr. Ahmed with possession of counterfeit Social Security cards with the intent to defraud and a charge of making false statements to the FBI was added two months later. Record 7. The district court set the trial date for July 17, 2003, and scheduled a hearing for June 15, 2003, on all pretrial motions, including a motion to suppress evidence because it was obtained by torture. Record 7.

However, on June 13, before this hearing could occur, the government moved to dismiss the indictment based on an order signed by the President of the United States. Record 7. The order stated that the President had "DETERMINED for the United States" that Mr. 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." Record 7. The President further determined that Mr. Ahmed's detention by the military was "necessary to prevent him from aiding al Qaeda." Record 7. The District of East Dakota granted the government's motion and, as a result, Mr. Ahmed was transferred to the Army Regional Consolidated Detention Facility in Souds, East Dakota. Record 7-8. Since that time, Mr. Ahmed has been held in the Detention Facility without charge or trial and has been given no indication as to the expected duration of his detention. Record 8.

While incarcerated in the Detention Facility, Mr. Ahmed filed this petition for habeas corpus under 28 U.S.C. § 2241, alleging that his detention as an enemy combatant was unlawful and that the government had to either charge him criminally or release him. Record 8. In reply, the government asserted that the President has statutory authority under the Authorization for the Use of Military Force ("AUMF") and inherent constitutional power to indefinitely detain Mr. Ahmed and any other individual the President determines is associated with Al Qaeda and a national security threat. Record 8. The government provided the statement of John R. Murphy, (Murphy Declaration), a hearsay document, as the basis of its claims that Mr. Ahmed is

associated with Al Qaeda, and contends that the process afforded Mr. Ahmed is consistent with the constitutional requirements of due process. Record 8.

The District of East Dakota disagreed with this assertion, finding that Mr. Ahmed had a right to challenge the factual basis of his detention set out by the Murphy Declaration, and outlined a burden shifting procedure in which he could do so. Record 9. Because Mr. Ahmed refused to recognize the constitutionality of this trial substitute and refused to present evidence on his behalf, the district court dismissed his habeas petition. Record 9. After a panel of the Twelfth Circuit upheld this dismissal, the court voted to rehear the case *en banc* and vacated the panel's decision. Record 10. The resulting hearing resulted in three separate opinions, with the majority of the panel determining (1) that the President had the statutory authority under the AUMF to detain an individual he deems to be an enemy combatant and (2) that the process afforded Mr. Ahmed to challenge this factual determination was insufficient. Record 28.

**SUMMARY OF THE ARGUMENT**

The Authorization for the Use of Military Force ("AUMF") does not authorize the President to indefinitely detain Mr. Ahmed. First, the AUMF only authorizes the President to detain enemy combatants. Under Supreme Court precedent and the laws of war, Mr. Ahmed is not a combatant because he is not associated with the military arm of an enemy government and has not directly participated in hostilities. Second, assuming *arguendo* that Mr. Ahmed is a combatant, the AUMF only authorizes the President to detain a combatant when such detention is "necessary and appropriate." *Hamdi v. Rumsfeld* and the international law of war establish that military detention of combatants is only necessary and appropriate for the purpose of preventing the combatant's return to the battlefield. Because Mr. Ahmed's detention is not necessary or appropriate in order to prevent his return to the battlefield, it is not authorized by the AUMF.

Furthermore, the President does not have the inherent constitutional power to detain Mr. Ahmed. Any such constitutional power would necessarily originate in the President's power as Commander-in-Chief. Because Mr. Ahmed is not a combatant, he is not subject to the President's war power. More importantly, after passage of the AUMF, Congress approved

express limitations on the President's power to indefinitely detain civilians suspected of terrorist activity. Because the President is acting against the express will of Congress in seeking to detain Mr. Ahmed indefinitely, his constitutional power is at its "lowest ebb." Therefore, his inherent constitutional power is not sufficient to justify the indefinite detention of Mr. Ahmed.

Under the Fifth Amendment, Mr. Ahmed cannot be detained indefinitely without charge or trial. The detention of any citizen may not be imposed without affording a meaningful habeas review. For a habeas review of an alleged enemy combatant, a court must adapt its procedure to meet the demands of the particular case by balancing the most elemental liberty interest of the individual—his personal freedom—against the burdens that the imposed procedure may create on the government. The procedural balance must also consider the serious risk of an erroneous deprivation of the individual's liberty interest.

This burden-shifting procedure created based on the facts and circumstances of *Hamdi* is insufficient in the instant case. The government in this case has neither the burden of litigating halfway around the world while waging a war nor the burden of discovery into military operations in Afghanistan, because Mr. Ahmed was investigated, arrested, interrogated, and detained in East Dakota. Because the government has no heightened

procedural burden, the remaining burden is precisely that of a normal criminal trial. The necessary balancing therefore weighs heavily toward the risk of the erroneous deprivation.

Further, the government's indefinite detention of Mr. Ahmed without charge is a fundamental violation of his due process. Mr. Ahmed is being detained indefinitely on mere allegations. The Fifth Amendment's Due Process Clause contains a substantive component that requires that detention stem from a criminal proceeding with adequate procedural protection, except for rare, highly regulated circumstances. Neither the government nor the Court should consider the circumstances or substance of the alleged crime; it has no bearing on the substantive process due Mr. Ahmed. Such an extra-judicial indefinite imprisonment is contrary to the basic values of American society embodied in the Fifth Amendment and should not be allowed.

Lastly, regardless of whether Mr. Ahmed's general denial of the allegations in the Murphy Declaration is sufficient under the burden-shifting procedure established in *Hamdi*, the absence of a demonstration that the Murphy Declaration is the most reliable evidence should be enough for Mr. Ahmed's release from indefinite detainment without a formal charge. The *Hamdi* burden-shifting creation was never meant to be a rigid protocol; it does not apply in Mr. Ahmed's case and should not prevent him from being released or charged with a crime.

ARGUMENT

I. THE PRESIDENT HAS NOT BEEN AUTHORIZED BY CONGRESS AND DOES NOT HAVE INHERENT CONSTITUTIONAL AUTHORITY TO DECLARE MR. AHMED, A CIVILIAN, TO BE AN ENEMY COMBATANT AND, ON THE BASIS OF SUCH CLASSIFICATION, INDEFINITELY DETAIN HIM.

A. The AUMF does not authorize the President to detain Mr. Ahmed because Mr. Ahmed is not a combatant according to precedent and the international law of war.

The Authorization for the Use of Military Force ("AUMF") does not authorize the detention of an individual who is not a combatant. The AUMF authorizes the President to use "all necessary and appropriate force" against all "nations, organizations, or persons" he determines were responsible for the attacks of 9/11. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a plurality of the Supreme Court held that this language authorized the President to detain, as an "enemy combatant," an American citizen who had been captured on the active battlefield in Afghanistan and had surrendered a rifle to U.S. allies. *Hamdi*, 542 U.S. at 510, 519. The Court specifically noted that it was only answering the "narrow question" of whether the President had the authority to detain "an individual who . . . was 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." *Id.* at 516 (emphasis added).

In *Ex parte Quirin*, 317 U.S. 1 (1942), relied on heavily by the *Hamdi* plurality, several German soldiers wearing military uniforms had secretly entered the United States by means of two German submarines and were carrying explosives and other incendiary devices for the purpose of bombing military targets inside the United States. *Ex parte Quirin*, 317 U.S. at 7-8. Despite the purported citizenship of Haupt, one of the saboteurs, the Court found that the President had the power to detain him and try him in a military tribunal because he was an "enemy belligerent" within the meaning of the law of war. *Id.* at 15-16. The *Quirin* court unanimously held that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war." *Hamdi*, 542 U.S. at 519 (quoting *Ex parte Quirin*, 317 U.S. at 15-16). Based on this precedent, the *Hamdi* court determined that the AUMF, in authorizing force against the Taliban, also authorized the "capture, detention, and trial of unlawful combatants" for the purpose of preventing "captured individuals from returning to the field of battle and taking up arms once again." *Id.* at 518. Again, the *Hamdi* plurality emphasized the narrowness of its holding, finding that "because detention to prevent a combatant's return to the battlefield is a fundamental incident

of waging war . . . , Congress has clearly and unmistakably authorized detention in the *narrow circumstances* considered here." *Id.* at 519 (emphasis added).

The Civil War case of *Ex parte Milligan*, 71 U.S. 2 (1866), also demonstrates the strict definition of a combatant to which the Supreme Court has adhered. In *Milligan*, the President had issued an order authorizing the detention of a resident of Indiana during the Civil War because he had conspired to "seize munitions of war," and "join[ed] and aid[ed] . . . a secret" enemy organization "for the purpose of overthrowing the Government and duly constituted authorities of the United States." *Milligan*, 71 U.S. at 6. Although the Court found that Milligan had committed an "enormous crime" in "the theatre of military operations" during "a period of war," it held that Milligan must be tried in the civilian courts because he was not a combatant. *Id.* at 7, 121-22, 130. The *Hamdi* plurality clarified the distinction between *Milligan* and *Quirin* by noting that if Milligan had been captured while "assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522. Thus, the fact that Milligan was not a member of the Confederate army and had not carried a weapon in battle was determinative of his status.

In the present case, Mr. Ahmed is a civilian who does not

fulfill either of the two requirements set out in the *Hamdi* plurality opinion for an enemy combatant. First, Mr. Ahmed is not associated with the military arm of a government with which the United States is at war. Both the *Hamdi* Court and the *Quirin* Court relied heavily on the fact that the detained individuals were members of the military arm of an enemy government, the Taliban and the Third Reich, respectively. The government alleges that Mr. Ahmed is a "member" of Al Qaeda in the same way that Haupt was a member of the German military. However, *Milligan*, upheld by *Hamdi* as good law, clearly establishes that membership in a criminal organization, even one attempting to overthrow the U.S. government, is not sufficient to justify detention. Whereas membership in the armed forces of an enemy nation is relatively easy to establish by means of uniforms, a soldier's concession, or participation on a battlefield, membership in a "secret organization" seeking to "overthrow the U.S. government," such as Al Qaeda or the organization in *Milligan*, is not as clearly defined and would grant the President extraordinary power.

To extend the holding of *Hamdi* and *Quirin* to include individuals unilaterally determined to be "combatants" on the basis of purported membership in a criminal organization would be to overrule *Milligan* and to eviscerate entirely the protections provided to civilians by the criminal justice

system. In the course of a "war on drugs" or "war on crime" the President could detain an alleged member of a drug cartel or an organized crime family as an "unlawful combatant" for the same actions for which Mr. Ahmed was originally criminally arrested. Membership by itself, then, has only been and should only be sufficient to justify indefinite detention in the narrow circumstances of membership in an enemy nation's armed forces.

Furthermore, the "longstanding law-of-war principles," upon which the *Hamdi* court relied in its interpretation of the AUMF's vague grant of military power to the President, recognize the same sharp dichotomy between a civilian and a combatant that *Milligan* recognized. See Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2108 (2005) ("Since the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers."). *Hamdi*, *Quirin*, and *Milligan* are all in accordance with the international understanding that an individual can be a "combatant" in one of two ways: (1) by associating "with the military arm of an *enemy government*," *Quirin*, 317 U.S. at 15; or (2) by directly engaging in hostilities. See Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3(1), 6 U.S.T. 3316 (entered into force Feb. 2, 1956) (prohibiting

attacks on civilians "taking no active part in the hostilities"); Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. at 2113-2114 ("The laws of war permit combatants to target other combatants, but prohibit them from targeting non-combatants unless the non-combatants take part in hostilities.").

The government has adopted an extremely broad definition of direct participation based on "support" or "substantial support" provided to Al Qaeda. See *Kiyemba v. Obama*, 555 F.3d 1022, 1024 n.1 (D.C. Cir. 2009) (government defining an enemy combatant as "an individual who was part of *or supporting* Taliban or al Qaida forces . . . ."). However, these contentions conflict directly with "long-standing principles of war" and find no support in *Hamdi* or *Quirin*, upon which the lower court so heavily relied. See, e.g., *Hamli v. Obama*, 616 F. Supp. 2d 63, 76 (D.D.C. 2009) (recognizing that the government was "essentially silent on the origins of the 'support' concept in the law of war," and had "import[ed] [the] principle[] from the criminal law context"); *Public Comm. Against Torture in Isr. v. Israel*, 46 I.L.M. 375, 391-392 (Isr. S. Ct. 2007) (finding, in the context of terrorism, that a civilian who "generally supports the hostilities against the army" or who "aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid" is not

directly participating in hostilities). Allowing the President to use a term as elastic as "support" to determine who is a combatant would eradicate constitutional protections against a overzealous President intent on punishing individuals exercising their democratic rights to oppose his policies. See Bradley & Goldsmith, 118 Harv. L. Rev. at 2115 (noting that, in modern wars, the category of people who "support[] the war effort . . . would include everyone"). The International Committee of the Red Cross (ICRC), after a six-year study, recently outlined a three-part definition of direct participation in hostilities: to qualify as a combatant, a civilian's actions must 1) be likely to cause a threshold of harm; 2) have a direct causal link to harm caused; and 3) in support of one party against another. NILES MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). Therefore, international principles, relied upon by the *Hamdi* Court, clearly establish specific criteria necessary for a civilian to become a combatant, and Mr. Ahmed does not meet any of these requirements.

Mr. Ahmed, unlike the combatants in *Hamdi* and *Padilla*, has never directly engaged in hostilities against the United States. Even Milligan committed an "enormous crime," with military consequences within an active war zone, but the Court did not

consider him a combatant. None of the cases cited by the Twelfth Circuit justify the detention of a civilian who has not participated in any way in a military conflict. Furthermore, Mr. Ahmed does not meet the international standards promulgated by the ICRC for "direct participation" in hostilities. His actions were not intended to cause harm or injury to the military, and, even if one accepted that they were, there is no direct causation between his actions and any harm. He, like Milligan and like the terrorists addressed by the Israeli Supreme Court in *Public Committee Against Torture*, may have supported a criminal organization, but he has not directly participated in hostilities against the United States. Therefore, since Mr. Ahmed cannot be declared a combatant on the basis of precedent or international law, the President is not authorized to detain him by the AUMF.

**B. The AUMF does not authorize the President to detain Mr. Ahmed because his detention is neither necessary nor appropriate to prevent his return to the battlefield.**

Even if the Court chooses to overrule *Milligan* and consider Mr. Ahmed an enemy combatant within the meaning of *Quirin* and *Hamdi*, the AUMF does not authorize his detention. The AUMF authorizes detention only when it is a "necessary and appropriate" use of force. According to *Hamdi*, detention itself is not inherent in the AUMF's grant of power; instead, only "detention to prevent a combatant's return to the battlefield is

a fundamental incident of waging war." *Hamdi*, 542 U.S. at 519. Moreover, international law reinforces that the sole purpose of military detention is to prevent the combatant from returning to the battlefield. Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 INT'L REV. RED CROSS 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'" (quoting decision of Nuremberg Military Tribunal, reprinted in 41 AM. J. INT'L L. 172, 229 (1947))).

Accepting *arguendo* the premise that a college town in East Dakota qualifies as a "battlefield," Mr. Ahmed still could not have returned to this battlefield because he was already incarcerated. Mr. Ahmed had been charged with serious crimes at the time of his designation as an enemy combatant, and, if the government's allegations about his ties to Al Qaeda are true, he could have been further charged with any one of numerous federal statutes aimed at combating terrorism, some of which carry the penalty of life imprisonment or even execution. See *Hamdi*, 542 U.S. at 547-48 (noting the Executive has a "well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit"). Similarly, the Twelfth Circuit seems to overlook or dismiss the President's power to prosecute criminals for their

actions. The hyperbolic assertion that "it defies logic to believe that Congress, in the days after 9/11, did not intend for the AUMF to allow the President to pursue individuals like the attackers who had just killed almost 3,000 people in the United States" entirely overlooks the possibility that Congress could have intended to authorize the President to target Al Qaeda militarily without intending to give the President the power to indefinitely detain civilians who had no ability to return to the battlefield and had not participated in any hostilities in the first place. In fact, the language of the Patriot Act, signed into law on October 26, 2001, *after* the passage of the AUMF, contemplates that alleged terrorists such as Mr. Ahmed will be charged in the criminal courts and expressly prohibits "indefinite detention," requiring the Attorney General either to begin "removal proceedings" or to "charge the alien with a criminal offense" "not later than 7 days after the commencement of such detention." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 § 412(a), Pub. L. No. 107-56, 115 Stat. 272. Thus, even if this Court holds that President's *military* detention power is limited, he would still possess the power to pursue individuals like the 9/11 attackers and *criminally* detain them.

If the government's allegations are true, Mr. Ahmed will

never have a chance to return to his battlefield of criminal activities, even more so since he is now a known figure and has lost the benefit of secrecy. Therefore, the military detention of Mr. Ahmed cannot be "necessary" or "appropriate" in this case in order to prevent him from returning to a battlefield. Instead, from the facts of this case, it appears that the government has a different purpose for its invocation of military detention, i.e., avoiding the constitutional requirements of due process that attend a criminal prosecution, see *infra* Part II(A), and the embarrassment of an open proceeding concerning the practice of torture.

In light of this argument, the government may assert that it is necessary and appropriate to detain Mr. Ahmed in order to extract information about other terrorist activities. However, this purpose for detention is entirely absent from *Hamdi* and the laws of war. Accepting this argument would allow the President to unilaterally detain any individual he desired to interrogate by simply deeming him a "combatant," regardless of whether the individual participated in hostilities or was a member of the military of an enemy government. This power would essentially render constitutional protections, such the right to counsel and the right against unreasonable searches and seizures, a nullity for civilians deemed "combatants" by the President. The limitation of military detention to the narrow purpose of

preventing return to the battlefield ensures that Commanders-in-Chief who wish to bypass the constitutional protections provided to civilians like Mr. Ahmed cannot abuse their military power.

Therefore, the AUMF only authorizes detention in the "narrow circumstances" in which this detention is "necessary and appropriate" to prevent a combatant from returning to the battlefield. First, Mr. Ahmed is not an enemy combatant within the meaning of that term established by *Hamdi*, *Quirin*, *Milligan*, and the laws of war. Furthermore, even if Mr. Ahmed is considered a combatant, his detention is not necessary or appropriate in order to prevent his return to the "battlefield," which is the only purpose for detention cited by the *Hamdi* Court and established in the international law of war. Therefore, the AUMF does not authorize the detention of Mr. Ahmed in this case, and the Court should require the government either to charge Mr. Ahmed with a criminal offense or release him.

**C. The President does not have the inherent authority under the Constitution to detain Mr. Ahmed as an enemy combatant.**

The President does not have inherent constitutional authority to detain an individual alleged to be a national security threat when he does not have Congressional approval to do so. Although the President does have some inherent power as Commander-in-Chief, see U.S. CONST. art. II, § 2, cl. 1, the "core of liberty secured by our Anglo-Saxon system of separated powers

has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi*, 542 U.S. at 555 (Scalia, J. dissenting). The Twelfth Circuit sidestepped this issue, determining only that the "Constitution provides a basis for, and does not undermine, the President's actions" in this case. Record 18. The majority relied on its finding that Congress, with the AUMF, authorized the President's actions and held, pursuant to Justice Jackson's famous *Youngstown* framework, that the President's powers were at their "maximum" because they were carried out with Congressional approval. *Id.*; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

First, as the previous arguments demonstrate, the AUMF does not authorize the President to indefinitely detain a non-combatant or to detain a combatant unnecessarily and inappropriately. Furthermore, Congress passed the Patriot Act after the AUMF and expressly limited the President's power to detain suspected terrorists indefinitely. In a section entitled "Limitation on Indefinite Detention," the Patriot Act only allows the Attorney General to detain an individual whose release "will threaten the national security of the United States" for up to six months. Patriot Act § 412(a). Therefore, the President's power is at its "lowest ebb" in asserting inherent power to indefinitely detain Mr. Ahmed, and he "can

rely only upon his own constitutional powers minus any constitutional powers of Congress" to justify detention. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court, relying in part on this language from *Youngstown* recognized that "[w]hether or not the President has independent power . . . he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. *Hamdan*, 548 U.S. at 593 n.23. Therefore, the President does not have the power to detain Mr. Ahmed indefinitely because doing so would disregard the limitations passed by Congress in the Patriot Act. Furthermore, the entire argument that the President's inherent war power under Article II authorizes detention of Mr. Ahmed rests on the incorrect assumption that Mr. Ahmed's detention is an incident of war. To the contrary, Mr. Ahmed is not a combatant under any existing legal definition of the term and *military* detention is only authorized for the sole purpose of preventing a return to the battlefield, which is not an issue in these circumstances. Therefore, Mr. Ahmed's detention is not a military detention and, thus, cannot logically flow from any inherent war power the President may have.

**II. MR. AHMED CANNOT BE DETAINED INDEFINITELY WITHOUT CHARGE, A TRIAL, OR MEANINGFUL HABEAS REVIEW.**

**A. The *Hamdi* burden-shifting framework does not adequately provide due process for alleged enemy combatants arrested on U.S. soil because the facts and circumstances demonstrate the Executive is procedurally burdened no more than in a normal criminal trial.**

The quintessential liberty that the Due Process Clause of the Fifth Amendment protects is a freedom from government imprisonment, detention, or other physical restraint. See U.S. CONST. amend. V. Mr. Ahmed seeks to exercise his right to the most basic rule under the Fifth Amendment: that no person may be incarcerated without due process of law. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

Since *Hamdi*, due process for "enemy combatants" requires an appropriate adaptation to the demands of the particular facts and circumstances of the case. *Hamdi*, 542 U.S. at 529. This adaptation is not a novel application of due process. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("Due process, unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstance." (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961))); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands"). In *Mathews v. Eldridge*, this Court presented the factors to consider when determining

the specific due process needs of a case involving a deprivation of property or liberty. *Mathews*, 424 U.S. at 335. The foremost consideration is "the private interest that will be affected by the . . . action." *Id.* Additionally, a court should adopt procedures by weighing the risk of an erroneous deprivation of the individual's interest against the government's burden of affording the imposed procedural requirements. *Id.* Naturally, the interest of Mr. Ahmed in this case for freedom from indefinite incarceration is "the most elemental of liberty interests." *Hamdi*, 542 U.S. at 529 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." (citing *Foucha*, 504 U.S. at 80)).

The "risk of erroneous deprivation" of an individual's liberty that occurs when there is insufficient process is real and is historically and jurisprudentially documented. See *Hamdi*, 542 U.S. at 530 ("[T]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions."). To ignore or downplay the risk of erroneous deprivation of an individual's liberty would create the next example in the pattern of American history of the executive branch significantly restricting civil liberties during times of fear and war, only later to recant and acknowledge its errors. See *Ex parte Milligan*, 71 U.S. 2 (1866)

(holding that the writ of *habeas corpus* had been wrongfully suspended during the Civil War (cited in Brief of Amicus Curiae Fred Korematsu at 2, *Rasul v. Bush*, 542 U.S. 466 (2004))). The judiciary has been, and continues to be, the check on an overzealous Executive and the protector of civil liberties. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the nationalization of steel mills during the Korean War was unconstitutional despite the executive insistence that the actions were necessary to maintain production of war material). However, the judiciary has, at times, deferred to the overzealous executive, unnecessarily sacrificing fundamental freedoms. See *Korematsu v. United States*, 323 U.S. 214, 247 (1944) (Jackson, J., dissenting) (“[A] civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can . . . apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.”); see also *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Black, J., dissenting) (“There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.”). In the instant case, there exists a grave danger of erroneously depriving Mr.

Ahmed of fundamental liberty at no procedural cost to the Executive. The *Hamdi* burden-shifting scheme was narrowly tailored to fit the facts and circumstances of the *Hamdi* case; the present case requires a separate analysis of its own facts and circumstances. After all, "it is not the . . . court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to." *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting).

Absent this Court ordering that Mr. Ahmed should receive the process accompanying a normal criminal trial, the weights of the individual interest of liberty and the Government's burden must be balanced. *Hamdi*, 542 U.S. at 528-29. The balance struck in *Hamdi* is not the same as the balance that must be struck in the instant case. In *Hamdi*, the petitioner was captured on the battlefield in Afghanistan, turned over to the U.S. military, and sent back to the United States to be detained. *Hamdi*, 542 U.S. 510. There were, in *Hamdi*, two very real concerns of the Executive: first, that "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away," and second, that "discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war." *Id.* at 531-32. *Hamdi's*

process was limited because a full criminal trial would have a deleterious impact "on the central functions of warmaking . . ." *Id.* at 534.

Mr. Ahmed's case does not present the same burdens to the government. Mr. Ahmed's entire investigation, arrest, interrogation, and detainment occurred within East Dakota. The simplicity and efficiency of the government's capture of Mr. Ahmed eviscerates its heightened procedural burden. There is no "battlefield" to which Mr. Ahmed can return because there is no battlefield in East Dakota. *See Supra* I(B). In this case, unlike *Hamdi*, the FBI and not "a coalition of military groups opposed to the Taliban government," investigated and discovered its evidence against Mr. Ahmed. Much of the evidence used to allege Mr. Ahmed's criminal activity is not historical or circumstantial. *Cf.* Declaration of Michael H. Mobbs, Joint Appendix. Vol. I at 148, *Hamdi*, 542 U.S. 507 (2004), available at <http://www.cbsnews.com/htdocs/pdf/hamdimobbs2.pdf>. Most of the evidence used to allege criminal activity against Mr. Ahmed is tangible and available for inspection in Wilson, East Dakota, where Mr. Ahmed resided and where he was originally detained. Without a heightened burden on the government, the procedural burden remaining is precisely that of a normal criminal trial. Therefore, the "proper constitutional balance," *Hamdi*, 542 U.S.

at 532, weighs heavily toward the "risk of an erroneous deprivation" of Mr. Ahmed's liberty interest.

Because Mr. Ahmed's due process liberty interest puts no heightened burden on the government, he is entitled to more robust process than the burden-shifting scheme created for the circumstances in *Hamdi*. See *Hamdi*, 542 U.S. at 533-34. The burden-shifting scheme provides that "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence." *Id.* at 534. This scheme is tied directly to the "exigencies of the circumstances" that do not apply in the instant case. *Id.* at 533.

The Twelfth Circuit dissent by Chief Judge Morrison does not properly characterize what *Hamdi* holds and what the Twelfth Circuit majority in part adopts: it is not the location of capture, but whether there is a procedural burden on a government at war that that changes the balance of due process for a detainee. Because there is no extraordinary governmental burden in the present case, due process commands that Mr. Ahmed be afforded the protection of a criminal trial or be released.

**B. The Government's Indefinite Detention of Mr. Ahmed without charge and on the basis of the Murphy Declaration, which is not the most reliable evidence available, is a fundamental violation of Mr. Ahmed's Due Process.**

Mr. Ahmed is being detained because the government has alleged, but has not charged, that he has engaged in criminal conduct. The Due Process Clause does have a "substantive component that bars arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (internal quotation marks omitted).

The substantive component of due process prohibits detention "unless the detention is ordered in a criminal proceeding with adequate procedural protections." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted). Though Mr. Ahmed has not been charged, his indefinite incarceration amounts to a criminal punishment. See *United States v. Salerno*, 481 U.S. 739, 751 (1987) (holding that only under the narrowest circumstances where the Government proves through "*clear and convincing evidence*" that an individual must remain incarcerated for pretrial purposes can he be held(emphasis added)). Due process balancing, see *supra* II(A), does not take into account the circumstances of the alleged crime, but only the procedural burden on the government. It has long been established by this Court that "commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983) (emphasis

added). The extra-judicial indefinite imprisonment of an individual is contrary to the basic values of our society embodied in the Fifth Amendment.

Further, the *Hamdi* opinion did not present its burden-shifting creation as a rigid protocol, but as the balance reached after weighing particular interests of the case. In so weighing those interests, the plurality conceded that when tailoring a procedure to alleviate the executive's burden during a military conflict, "[h]earsay, for example, may need to be accepted as the most reliable evidence from the Government in such a proceeding." *Hamdi*, 542 U.S. at 533-34. As established above, *supra* at II(A), the burdens of the executive that existed in *Hamdi* do not exist in the instant case. Never has it been suggested by the Court that normal minimal due process should not be used in a case where there are no heightened burdens on the executive. See *Zadvydas*, 533 U.S. at 690 (holding that government detention violates the Due Process Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections). Due process for an alleged enemy combatant in a situation similar to *Hamdi's* would require at minimum, in addition to a notice of the factual basis for his classification as an enemy combatant, "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533. The minimum due

process in the instant case is higher because the government does not carry the same burdens as it did in *Hamdi*. Therefore, the minimum due process plan, i.e. the burden-shifting scheme, created to satisfy procedural due process in *Hamdi* does not satisfy the minimum due process for Mr. Ahmed.

Minimal due process proceedings in a criminal context would require the opportunity to be heard in person, the opportunity to present witnesses, and the opportunity to confront and cross-examine adverse witnesses. See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (holding that the right to cross-examine and call witnesses on one's behalf have long been recognized as essential to due process).

The idea that Mr. Ahmed's allegations may "go beyond the definition of normal civilian crimes," see Record 46 (Morrison, C.J., dissenting), should not enter the analysis of whether he is to be afforded the full due process of a normal criminal proceeding. The right to due process does not depend on the merits of a claimant's substantive assertions. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). When normal criminal procedures are compromised in order to detain an alleged enemy combatant, it should not be out of sheer convenience to the government.

"[H]istory and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression

and abuse of others who do not present that sort of threat.”

*Hamdi*, 542 U.S. at 530.

Therefore, regardless of whether Mr. Ahmed’s general denial of the allegations in the Murphy Declaration is sufficient, the absence of a demonstration that the Murphy Declaration is the most reliable evidence should be enough for Mr. Ahmed’s release from indefinite detainment without a formal charge.

### **CONCLUSION**

For the foregoing reasons, Petitioner Mr. Ahmed requests that the Court, pursuant to its power under 28 U.S.C. § 2241, order that the government either charge Petitioner with a criminal offense or release him, or, alternatively, that the Court remand his case with instructions to the lower courts to provide the same level of due process that is required in a criminal trial and that is consistent with the Fifth Amendment, including a fair opportunity to contest the factual basis of his detention and confront his accusers.

Respectfully Submitted,

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