

No. 08-11144

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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  
SUPREME COURT OF THE UNITED STATES*

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BRIEF FOR PETITIONER

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TEAM NUMBER 7462

*Counsel for the Petitioner*

AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY  
2010 CONSTANCE BAKER MOTLEY MOOT COURT COMPETITION  
IN CONSTITUTIONAL LAW

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## 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 permits, the seizure and indefinite military detention of a person lawfully residing in the United States without criminal charge or trial, based on the government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?
2. Whether the process afforded by the district court to Burhan Uddin Ahmed (Hereinafter "Petitioner") to challenge his designation as an "enemy combatant" was adequate under the requirements of the Fifth Amendment?

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## **STATEMENT OF JURISDICTION**

The Twelfth Circuit Court of the United States entered its most recent opinion in this case on November 24, 2008. The Twelfth Circuit granted a timely petition for rehearing en banc, where it reversed and remanded for further proceedings. Cross petitions for writ of certiorari were granted by this Court on October 2, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

## **STATUTES INVOLVED**

### **U.S. Const. amend. V:**

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

### **Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF):**

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that

the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title.

This joint resolution may be cited as the "Authorization for Use of Military Force".

Section 2. Authorization for Use of the United States Armed Forces.

(a) In General. That the President is authorized to use all necessary and appropriate force against those nations,

organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements.

(1) Specific Statutory Authorization. Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of Other Requirements. Nothing in this resolution supersedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

## STATEMENT OF THE CASE

Burhan Uddin Ahmed (hereinafter "Petitioner"), a citizen of Pakistan, came to this country to pursue a degree in veterinary medicine. Four months after lawfully entering the United States with his family, however, federal agents arrested Petitioner in connection with the Government's investigation of the 9/11 attacks. Petitioner later filed a petition for a writ of habeas corpus challenging his military detention as an "enemy combatant." The United States District Court for the District of East Dakota dismissed his complaint. On Petitioner's appeal, a panel of the Twelfth Circuit Court of Appeals affirmed the district court's ruling. The twelfth circuit granted Petitioner's subsequent petition for an en banc rehearing and vacated the panel opinion. On rehearing, the court ruled that although the President has the statutory and constitutional authority to detain Petitioner under the circumstances of this case, the process afforded Petitioner to challenge his designation as "enemy combatant" did not comport with the Due Process Clause of the Fifth Amendment. Accordingly, the twelfth circuit reversed and remanded for further proceedings. Both Petitioner and the United States petitioned this Court for writs of certiorari. This Court granted to petitions to hear two issues: (1) whether the President has authority to designate

Petitioner, a legal immigrant, as an “enemy combatant” and subject him to indefinite military detention; and (2) if so, whether the process the district court afforded to Petitioner to challenge his “enemy combatant” designation was sufficient under the Due Process Clause of the Fifth Amendment?

### **Factual Background**

On September 11, 2001, the al Qaeda terrorist network hijacked multiple commercial airliners and crashed them into prominent targets in the United States, killing approximately 3,000 people. One week later, Congress passed a resolution, the Authorization for Use of Military Force (hereinafter “AUMF”), authorizing 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 (2001).

On September 8, 2001, Petitioner entered the United States with his family to pursue a doctor of veterinary medicine degree at Wilson University in Wilson, East Dakota. Four months later, on January 3, 2002, federal agents arrested Petitioner in Wilson. Initially, he was detained as a material witness in the Government’s investigation of the 9/11 attacks. In November of 2002, Petitioner was charged criminally in the United States District of East Dakota with possession of counterfeit Social Security cards with the intent to defraud. In January of 2003,

Petitioner was further charged with making false statements to the FBI. Petitioner pleaded not guilty to all charges and the district court set a trial date for July 17, 2003. On June 9, 2003, the court scheduled a hearing for June 15, 2003 on all pretrial motions including Petitioner's motion to suppress evidence allegedly obtained by torture. On June 13, 2003, however, the Government filed an *ex parte* motion to dismiss the indictment based on an order signed that morning by the President of the United States.

The President's order stated the he had determined that Petitioner: (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." *Ahmed v. United States*, No. 06-9701, 8 (D. E.D. 2008), *appeal docketed*, No. 08-11144 (Oct. 2, 2009). Finally, the President determined that Petitioner's military detention was "necessary to prevent him from aiding al Qaeda" and ordered the Attorney General to surrender Petitioner to the Secretary of Defense for detention as an enemy combatant. *Id.* at 8.

The District Court of East Dakota granted the Governments motion to dismiss the criminal charges and transferred Petitioner to military custody. The military has held Petitioner as an enemy combatant ever since, without charge or trial. There has been no indication as to when Petitioner's military detention will end.

### **Procedural History**

After his transfer to military detention, Petitioner filed a petition for writ of habeas corpus in the District of East Dakota under 18 U.S.C. § 2241. The petition asserted that Petitioner's detention as an enemy combatant was unlawful and that he must be released unless criminal charges were filed against him. In the alternative, Petitioner argued that he was entitled to a hearing to challenge the factual basis for his designation as an enemy combatant.

In opposing his release, the Government argued that, because Petitioner had been designated as an al Qaeda affiliate who "prepar[ed] for acts of international terrorism," the President has both statutory authority under the AUMF and inherent authority under the Constitution to indefinitely detain Petitioner. In addition, the Government asserted that the

process afforded for Petitioner to challenge his detention was adequate.

The Government submitted to the court a hearsay document prepared by the Director of the Joint Task Force for Combating Terrorism, John R. Murphy (hereinafter "Murphy Declaration").<sup>1</sup> The Murphy Declaration sets out what appears to be the only evidence offered by the government to support Petitioner's alleged involvement with al Qaeda. The Murphy Declaration, a spacious two-page document containing allegations based on undisclosed intelligence gathered by the Government, states that Petitioner was an al Qaeda sleeper agent within the United States; that he had attended a terrorist training camp in Afghanistan; that he had communicated with Osama Bin Laden and received aid from other high-ranking members of al Qaeda; that he entered the United States with the intent to commit terrorist attacks within the country; and that he possesses valuable intelligence about al Qaeda. None of these allegations cite to any source of information, even in the most general terms. App. 1, ¶ 4.

Based on the Murphy Declaration, the district court agreed that the President could detain Petitioner as an enemy combatant, but found that Petitioner was entitled to challenge

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<sup>1</sup> A copy of the Murphy Declaration is attached as Appendix 1.

the factual basis of his detention at a hearing in accordance with his procedural due process rights under the Constitution. The district court referred the case to a magistrate judge to determine the breadth of his due process rights. The magistrate judge rejected Petitioner's argument that he had a right to procedural safeguards similar to those of civilian criminal defendants and determined instead that the appropriate process requires first that the Government provide Petitioner with notice of the factual basis of his detention. If the Government could produce credible evidence supporting Petitioner's designation as an enemy combatant, the burden would shift to Petitioner to refute this designation with more persuasive evidence. If Petitioner could produce such evidence, the Government must either release him or agree to a full adversarial hearing with more robust procedural safeguards.

Under this framework, the magistrate judge concluded that the Murphy Declaration provided Petitioner with sufficient notice of the factual basis for his detention, and sufficient evidence in support of his designation as enemy combatant to shift the burden to Petitioner to produce more persuasive evidence to the contrary. The magistrate judge allowed 60 days for Petitioner to present such evidence.

Petitioner responded with a general denial but did not present any evidence to rebut the Murphy Declaration, citing

that the procedures adopted by the magistrate judge were unconstitutional, *i.e.*, he should not be forced to prove his own innocence under the circumstances of his case. Based on Petitioner's failure to present rebuttal evidence, the magistrate judge recommended, and the district judge ordered, that his petition for a writ of habeas corpus be dismissed.

Petitioner appealed the district court's dismissal of his habeas petition and a panel of the Twelfth Circuit Court of Appeals affirmed. The twelfth circuit granted Petitioner's subsequent petition for rehearing en banc. On rehearing, in a fragmented decision, a majority of the court joined in a opinion that the President does have the power to detain Petitioner as an enemy combatant, but that Petitioner had not been afforded adequate process to challenge his designation as an enemy combatant. The judgment of the district court was therefore reversed and remanded for further proceedings.

Both parties petitioned the Supreme Court of the United States for writs of certiorari. On October 2, 2009, this Court granted the certiorari to hear two issues: (1) whether the AUMF authorizes, and if so whether the Constitution permits, the seizure and indefinite military detention of a person lawfully residing in the United States without criminal charge or trial, based on the government assertions that the detainee conspired with al Qaeda to engage in terrorist activities; and (2) whether

the process afforded Petitioner by the district court to challenge his designation as an "enemy combatant" was adequate under the requirements of the Fifth Amendment?

## SUMMARY OF ARGUMENT

While the AUMF undoubtedly authorizes the President to militarily detain certain individuals who are properly designated enemy combatants, it does not authorize the indefinite military detention of an individual, such as Petitioner, who never took up arms against the United States on a battlefield. The AUMF does not define enemy combatant, but this Court went to great lengths to explain that the purpose of the AUMF is to prevent dangerous persons from returning to the field of combat. Because Petitioner was lawfully residing in the United States at the time of his seizure, and because Petitioner never came close to stepping foot on the battlefield, Petitioner is not an enemy combatant for purposes of the AUMF.

Moreover, because the AUMF does not authorize the President to militarily detain Petitioner, any authority the President has in this regard must be found in the Constitution. Although Article II of the Constitution permits the President, as Commander in Chief, to wage war under certain circumstances, it does not permit the President to indefinitely detain a civilian who is residing lawfully in this country, and who never engaged in hostilities toward the United States military or its allies. Accordingly, the President does not have the inherent

constitutional authority to indefinitely hold Petitioner in military detention.

Beyond this, Petitioner has been denied Due Process. In the bald absence of the sort of uncommon burden on the military of producing more reliable evidence contemplated in *Hamdi*, the Murphy Declaration is inadmissible hearsay and should not have been admitted by the district court, below. Therefore, under the framework set forth in *Hamdi*, the government never met their burden to produce "credible evidence" sufficient to transfer the burden to Petitioner to produce more persuasive evidence to the contrary.

Even assuming, *arguendo*, that the President has the sweepingly broad authority discussed above, and that the Murphy Declaration was properly admitted in lieu of more reliable evidence under the *Hamdi* framework, the cursory hearsay allegations contained in that shallow document are so unsubstantiated it fails to provide Petitioner with any meaningful opportunity to contest the factual basis for his detention before a neutral decisionmaker, as Due Process requires.

For any and all of these reasons, Petitioner must be released from his wrongful military detention.

## ARGUMENT

### I. THE AUMF DOES NOT AUTHORIZE, AND THE CONSTITUTION DOES NOT PERMIT, THE PRESIDENT'S SEIZURE AND INDEFINITE MILITARY DETENTION OF A PERSON WHO NEVER TOOK UP ARMS AGAINST THE UNITED STATES ON THE FIELD OF COMBAT, AND WHO IS SEIZED AND DETAINED WHILE LAWFULLY RESIDING IN THE UNITED STATES.

The threshold issue before the court is whether the President has the authority to indefinitely detain Petitioner as an "enemy combatant,"<sup>2</sup> even though it is uncontested that he entered this country lawfully, was attending graduate school and was living peacefully with his family in the United States at the time that he was arrested. The Government claims that the AUMF and the Constitution enable to President to detain Petitioner militarily, as an "enemy combatant," ostensibly to prevent his return to the field of battle.

In this war against an international terrorist network no country or government can be identified as the enemy. This alone poses analytical challenges in determining who is an

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<sup>2</sup> An ancillary issue that has faced the Court previously is what "indefinite detention" means in the context of the war on terrorism. It has been firmly established that even proper detention of an enemy combatant cannot extend beyond the duration of the relevant armed conflict. However were, as here, there may never be a clear formal end to the war, the practical effect of such a rule may well be a life sentence. Petitioner merely notes here that this case presents another opportunity for this court to address the issue of when such a war "ends" for the purpose dictating the release of enemy combatants.

"enemy combatant" under the international law of war and the correlated delineation of the breadth of the President's power as Commander in Chief to detain enemy combatants. It is tempting to use the unconventional nature of the war with the Taliban and al Qaeda, and our fear of another terrorist attack to justify expanding the scope of the President's authority, empowering him detain almost anyone as an "enemy combatant." However, a line must be carefully drawn lest we destroy the self same liberty we wage war to defend, and this case presents a highly appropriate opportunity to do just that.

**A. The AUMF does not authorize the seizure and indefinite military detention of Petitioner, because Petitioner is not an enemy combatant.**

It is axiomatic that the President's powers to detain a person as an enemy combatant can only reach those who are *properly* designated as such. The decision of the circuit court that the AUMF authorizes the President to seize and militarily detain Petitioner should be reversed because Petitioner never fought against the United States on a field of battle, and therefore was improperly designated an enemy combatant.

There is no dispute that the AUMF authorizes the seizure and military detention certain individuals who are properly designated as enemy combatants. However, the term "enemy

combatant" is not defined or even mentioned in the AUMF. Instead, the AUMF provides, "[t]hat 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."<sup>3</sup> 115 Stat. 224 (2001) (emphasis added). This does not mean, however, that this Court is without guidance as to what constitutes an enemy combatant for purposes of the AUMF.

Where a person fights against the United States on a field of battle, the AUMF authorizes that person's designation as an enemy combatant, and allows for that person's indefinite military detention in order to *prevent that person from returning to the battlefield*. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (U.S. 2004). *See also Padilla v. Hanft*, 423 F.3d 386, 391-92 (4th Cir. 2005) (holding that a person who is "armed and present in a combat zone during armed conflict. . . [with] the armed forces of the United States," is an enemy combatant for purposes of the AUMF, and may be detained pursuant thereto in order to prevent that person's return to the battlefield).

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<sup>3</sup> While it may be a moot point in light of this court's prior holdings, it bears mentioning at least that, based on Petitioner's reading of the plain language in the AUMF, it narrowly tailored to reach only those who *aided* the 9/11 attacks and not, *e.g.*, even those who may assist in future attacks.

Here, Petitioner and his family legally entered the United States on September 8, 2001, so that Petitioner could pursue a doctorate degree in veterinary medicine at Wilson College in East Dakota App. 1, ¶8. Although the government alleges that Petitioner entered the United States as a “sleeper agent” of al Qaeda, there is no dispute that Petitioner never took up arms against the United States on the battlefield App. 1, ¶9. In fact, Petitioner legally entered the United States three days before the horrific events that unfolded on September 11, 2001, and at no point after his legal entry to this country did Petitioner leave the United States. App. 1, ¶8.

Conversely, the AUMF does *not* authorize the seizure and indefinite military detention of a person who has never taken up arms against the United States or its allies on the battlefield. *Hamdi*, 542 U.S. at 518; *Padilla*, 423 F.3d 386, at 391-92. In *Hamdi*, the defendant, an American citizen who moved abroad, took up arms with the Taliban and fought against the United States in Afghanistan. *Hamdi*, 542 U.S. at 510. While engaged in an armed conflict in Afghanistan, the defendant was captured and surrendered his assault rifle. *Id.* at 513. The defendant was initially detained and interrogated in Afghanistan, and was eventually transferred to a holding base in the United States once it was determined that he was an American citizen. *Id.* at 510. The sole evidentiary support for the Government’s

detention of the defendant was found in the declaration of Michael Mobbs (hereinafter "Mobbs Declaration"), the Special Advisor to the Secretary of Defense for Policy. *Id.* at 512-513. The Mobbs Declaration stated that "a subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant."<sup>4</sup> *Id.* at 513. The Court held that, under the narrow circumstances of the case, where the defendant was captured on the battlefield in Afghanistan with a rifle in his hands, the AUMF authorized his detention as an enemy combatant, despite his status as a United States citizen. *Id.* at 517. The Court reasoned that, "There can be no doubt that individuals who *fought against the United States in Afghanistan* as part of the Taliban. . . are individuals Congress sought to target in passing the AUMF." *Id.* at 518 (emphasis added). Further, the Court stated that, "[b]ecause detention to *prevent a combatant's return to the battlefield* is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." *Id.* at 519 (citing to section 2(a) of the Authorization

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<sup>4</sup> It is important to note not only the nature of the allegations found in the *Hamdi* Mobbs Declaration, but also the greater level of factual support for the allegations contained therein, as compared to the shallowness of the Murphy Declaration in this case.

for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)) (emphasis added).

Likewise, in *Padilla*, the defendant was an American citizen who took up arms against the United States in Afghanistan. *Padilla*, 423 F.3d at 388. According to the Government in that case, after escaping a battle in Afghanistan, the defendant made his way to Pakistan where he took refuge with other al Qaeda fighters. *Id.* The defendant was then sent to the United States by al Qaeda leaders in order to blow up apartment buildings. *Id.* On May 8, 2002, the defendant flew to America to implement his assignment, but was arrested by FBI agents upon his arrival at a Chicago airport. *Id.* The *Padilla* court held that the President's military detention of the defendant as an enemy combatant was authorized by the AUMF, because "such power [is] universally accepted under the laws of war as necessary in order to prevent the return of combatants to the battlefield during conflict." *Id.* at 392 (emphasis added).

In reaching its holding, the *Padilla* court relied heavily on this Court's decision in *Hamdi*, *Id.* at 393, and explained that the reasoning underlying *Hamdi* "was that Hamdi's detention was an exercise of 'necessary and appropriate force' within the meaning of the AUMF because 'detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war.'" "

Further, the *Padilla* court relied on what it felt was the definition of "enemy combatant" as defined by this Court in *Hamdi*. That definition, as stated by the *Padilla* court, is as follows: enemy combatants are "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." *Id.* at 391 (emphasis added). Moreover, the court repeatedly stated that the defendant in *Padilla*, just like the defendant in *Hamdi*, took up arms against the United States in Afghanistan, and therefore, the defendant's "detention is no less necessary than was Hamdi's in order to prevent his return to the battlefield." *Id.* at 392.

Petitioner, because he has never taken up arms against the United States on a battlefield, should not be designated an enemy combatant and indefinitely held by the military under the President's authority to implement the AUMF. Unlike the defendants in *Hamdi* and *Padilla*, Petitioner never set foot on a battlefield. There is no allegation that Petitioner ever fired a weapon or even confronted any U.S. soldiers. If, as this Court held in *Hamdi*, the AUMF authorizes the President to detain enemy combatants in order to prevent their return to the battlefield, then Petitioner, a person lawfully residing in the United States who never entered the zone of combat, does not fall under the umbrella of the AUMF.

Moreover, the definition of "enemy combatant," as expressed by this court in *Hamdi*, does not include Petitioner, because Petitioner was not "part of or supporting forces hostile to the United States. . . in Afghanistan and who engaged in armed conflict against the United States there." *Hamdi*, 542 U.S. at 516.<sup>5</sup>

It is eminently clear, then, that Petitioner's connection to al Qaeda, if any, was of an entirely different nature from those of defendants challenging their classification as enemy combatants before this court previously. In concluding that the AUMF authorizes the President to indefinitely detain, as an enemy combatant, a person lawfully residing in the United

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<sup>5</sup> In fact, Petitioner notes that Congress passed a statute to specifically deal with the situation we are confronted with in this case when it passed the 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 (hereinafter "Patriot Act"). The Patriot Act authorizes the detention of an alien residing in the United States who is found to have engaged or is likely to engage in terroristic activity, or he "is engaged in any other activity that endangers the national security of the United States. Patriot Act § 412(a); 8 U.S.C. § 1182(a)(3)(A)-(B). While it is virtually common knowledge that a specific statute governs a general statute when there is a conflict, the circuit court below found, in a passing footnote, that there was no conflict between the Patriot Act and the AUMF because they concern different powers of the President. *Ahmed v. United States*, No. 06-9701, 17-18 (D. E.D. 2008), *appeal docketed*, No. 08-11144 (Oct. 2, 2009). However, the circuit court failed to consider the major conflict between the two statutes: the AUMF authorizes indefinite detention, and the Patriot Act does not. Here, there is no doubt that Petitioner is an alien who was residing in this country and accused of engaging in activity against this country's national interest. If this is not an appropriate case to employ the Patriot Act, what would be? Obviously, the Patriot Act would not have applied in *Hamdi* because the defendant in that case was not an alien residing in the United States. Petitioner, however, is an alien that was residing in the U.S. at the time of his seizure, and as such, the Patriot Act, which is designed to specifically deal with this situation, should control this case, not the broad and ambiguous language of the AUMF.

States, who never took up arms against the United States on a battlefield, the circuit court below clearly misapplied the explicitly "narrow" holding in *Hamdi*, wholeheartedly ignored the reasoning employed by the Fourth Circuit in *Padilla*, and in essence, broadened the definition of enemy combatant to an extent never contemplated by Congress or the framers of the Constitution.<sup>6</sup>

**B. The President does not have the inherent power under the Constitution, and certainly not absent Congressional authorization, to seize and militarily detain, for an indefinite period of time, a person lawfully residing in the United States.**

The Twelfth Circuit Decision below that the President has the inherent power under the Constitution to seize and militarily detain Petitioner should be reversed because the President's Article II power to wage war does not, by itself, provide the President with authority to indefinitely detain individuals legally residing in the United States. The issue we

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<sup>6</sup> Despite this Court's heavy reliance in *Hamdi* and *Padilla* on the fact that those defendants were engaged in armed conflict in Afghanistan in deciding that they were properly designated as "enemy combatants," it may be argued that the Court did not intend to establish minimum criteria for conduct that justifies a proper designation as such. However, even if this argument has merit and less blatant conduct might still fit the "enemy combatant" definition, it most certainly does not compel this Court to find Petitioner an enemy combatant. If this Court sees it prudent to extend the minimum "enemy combatant" criteria to include something less than the facts of *Hamdi* and *Padilla*, this is surely an opportune case for this Court to establish a "floor" to such criteria.

are confronted with is whether the President, if not acting pursuant to the express consent of Congress, has the inherent authority under the Constitution to militarily detain civilians who are peacefully and lawfully residing in the United States. As stated by the circuit court below, "there is nothing in the Constitution that forbids the President, *who is acting with the express consent of Congress*, from declaring an individual associated with an organization that has undertaken acts of war against the United States to be an enemy combatant." *Ahmed v. United States*, No. 06-9701, 18 (D. E.D. 2008), *appeal docketed*, No. 08-11144 (Oct. 2, 2009) (emphasis added). *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (The President's power is at its maximum when the President acts pursuant to congressional authorization, and "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) ("the Constitution itself gives the Commander in Chief [the authority] to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in the time of war."). Here, if the Government is to be believed, Petitioner entered the United States for the alleged purpose of committing social security fraud, hacking into computer systems, and creating havoc in our country's

social safety net. App. 1, ¶ 11, 17-18. Assuming that the President did not act pursuant to the AUMF when he detained Petitioner as an enemy combatant, the authorization for the President to militarily detain Petitioner must have come from the President's Article II Commander in Chief power. However, because Petitioner was lawfully residing in the United States when he was seized, and because none of the acts for which Petitioner was charged amounted to an offense in violation of the law of war, the President did not have the inherent Constitutional power under Article II to seize and militarily detain Petitioner.

The President, as Commander in Chief, has only the inherent Constitutional power to direct the performance of those military functions that are, themselves, constitutional. *Quirin*, 317 U.S. at 28. In *Quirin*, the defendants were all German spies who secretly entered the United States for the purposes of "destroying war materials and utilities." *Id.* at 45. The Court held "that *those particular acts* constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." *Id.* (emphasis added). The court reasoned that because these war-like acts constituted an offense against the law of war, the Constitution permitted the President, acting pursuant to both his inherent constitutional power and congressional authority, to militarily try the defendants. *Id.*

at 29. Moreover, the Court stressed that although the defendants never engaged in combat with our military, their acts were still in violation of the law of war because “[m]odern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces.” *Id.* at 37. The Court noted, however, that “[i]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.” *Id.*

Petitioner, because he did not violate a law of war, is not subject to military detention by the President pursuant to the President’s Article II Commander in Chief power, and because the AUMF does not authorize the military detention of Petitioner, the President is without any constitutional authority whatsoever to military detain Petitioner.

Unlike the defendants in *Quirin*, Petitioner did not enter this country with the intent to destroy “war materials and utilities.” His alleged plans were in no way directed at our military, or our militaries war supplies. However despicable the alleged plans of Petitioner may have been, those alleged plans, such as the alleged intention to commit social security

fraud and create havoc with our country's "social safety net," were not the war-like plans that allowed the defendants in *Quirin* to be militarily tried for crimes against the law of war.

The circuit court below never considered whether the President had inherent constitutional power to militarily detain Petitioner, because it brashly assumed that, "given the clarity of the authorization set forth in the AUMF, we do not devote too much a time to determining whether the President has, by virtue of the powers granted in the Constitution, the inherent authority to detain [Petitioner]." *Ahmed v. United States*, No. 06-9701 (D. E.D. 2008), *appeal docketed*, No. 08-11144, 18 (Oct. 2, 2009). Instead, the circuit court simply noted that the President has "some" inherent power under Article II to wage war. *Id.* Noting further that the President's power is at its maximum when authorized by Congress, the circuit court never adequately considered whether the President has the inherent Constitutional power to militarily detain Petitioner. However, because the AUMF, as discussed in Part A, *supra*, does *not* authorize the military detention of Petitioner, and because the President has no inherent authority under Article II of the Constitution to detain Petitioner, the circuit court erred in concluding that the Constitution provides a basis for the President to military detain Petitioner.

**II. THE PROCESS AFFORDED TO PETITIONER TO CHALLENGE HIS DESIGNATION AS AN ENEMY COMBATANT WAS INSUFFICIENT UNDER THE GUARANTEES OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.**

Even if this Court holds finds that the President has the altogether unprecedented authority to detain Petitioner as an “enemy combatant,” the lower courts erred in finding the Murphy Declaration to be “credible evidence,” sufficient to yoke Petitioner with the untenable burden of proving his own innocence. Further, even if deemed admissible, the allegations contained in the Murphy Declaration are far too cursory to afford Petitioner a meaningful opportunity to offer rebuttal evidence.

**A. The Due Process Analysis Set Forth by this Court in *Hamdi*.**

*Hamdi* is the seminal case dealing with “...the process that is constitutionally owed to one who seeks to challenge his classification as [an enemy combatant under the AUMF].” *Hamdi*, 542 at 509. As discussed above, the defendant in *Hamdi* was arrested by military personnel on the battlefield in Afghanistan while bearing arms alongside the Taliban. Still, the *Hamdi* plurality rejected the Government’s assertion that the Court could not comprehend the “military decision-making” relevant to enemy combatant determinations and that individual rights of the

accused were, therefore, entirely eliminated. *Id.* at 527. The *Hamdi* court also rejected the Government's proffer that the "some evidence" standard, never before recognized as a valid of burden of proof,<sup>7</sup> should be sufficient to overcome an individual's habeas petition challenging their detention as an enemy combatant. The Court noted that care must always be taken not to "minimize the importance and fundamental nature of the individual's right to liberty." *Id.* at 529 (internal quotations omitted) quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Cognizant that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," *Hamdi* at 531 quoting *O'Connor v. Donaldson*, 422 U.S. 563, 575, (1975), this Court set out to balance the Government's interest in detaining those who actually pose a threat to national security and the burden the Government would face in providing greater process, against the enduring liberty interests of the accused in being free from physical detention, which lies at the core of the liberty protected by the Due Process Clause. *Id.* at 528 citing *Mathews v. Elridge*, 424 U.S. 319 (1976).

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<sup>7</sup> The *Hamdi* court noted that the Government, in their own brief, recognized that the "some evidence" test has only ever applied as a judicial standard of review. Thus, the Government was advocating a conflation of the executive with the judicial branch; their determinations would receive the same deferential treatment on review as an impartial tribunal. Ironically, this stance illustrates instead the importance of a watchful and diligent judiciary as a check on executive overreaching.

Against this backdrop, this Court held in *Hamdi* that 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.”<sup>8</sup> *Hamdi*, 542 U.S. at 533. The burden-shifting procedure that the *Hamdi* court adopted requires the government to put forth “credible evidence” that a habeas petitioner meets the enemy combatant criteria, at which point the burden shifts to the petitioner to prove with more persuasive evidence that he falls outside the criteria. *Id.* at 534.

#### **B. Application of the *Hamdi* Framework to the Case at Bar.**

As the Twelfth Circuit correctly held below, under the facts of this case, the process afforded to Petitioner to challenge his designation as enemy combatant must fail under the *Hamdi* Framework.

The Government here rests their entire case on a two-page hearsay declaration containing only perfunctory accusations that Petitioner, *inter alia*, attended a terrorist training camp and was “commissioned by al Qaeda to enter the United States as a

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<sup>8</sup> While this test in *Hamdi* applied to a “citizen-detainee,” the court gave no indication, and it would be strange to think, that, e.g., a graduate student arrested while lawfully residing in the United States would receive weaker constitutional protection than *Hamdi*, a long-departed citizen arrested in Afghanistan while bearing arms with the Taliban.

sleeper agent.” App. 1, ¶ 9. The preamble in the Murphy Declaration recites that the declarant is familiar with the case “based on the information I have acquired in the course of my official duties” but does not specify in any meaningful way the source of the information. App. 1, ¶ 3. The declaration goes on to state that the President similarly declared Petitioner an enemy combatant “based on intelligence gathered and analyzed through the cooperation of several Executive Branch agencies.” App. 1, ¶ 4.

Under the facts of this case, the constitutional deficiency of such a skeletal and conclusory evidentiary basis for detention as that found in the hearsay Murphy Declaration is almost self-evident.<sup>9</sup> To support the admissibility of the Murphy Declaration, the Government will cite to the language in *Hamdi* that “enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” *Hamdi*, 542 U.S. at 533. After all, it is true that, depending on the nature of the case, hearsay evidence may need to be accepted in lieu of more reliable evidence. *Id.* at 534. The glaring fatal flaw in that argument, of course, is that there are no such “uncommon burdens” in this case. Besides that, as will be discussed, the fact of

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<sup>9</sup> This deficiency is further exacerbated in light of Petitioner’s contention that some of this “information” was obtained through torture; not exactly a far-fetched notion in light of Government’s track record in this regard.

admissibility says nothing as to the specificity and substance required in such a hearsay document to satisfy the "credible evidence" burden.

Indeed, where a detainee is arrested by military personnel deployed overseas, the value of even such basic evidentiary safeguards as the best evidence rule and the right to cross-examination may well be outweighed by the burden of calling military personnel away from the battlefield. However, Petitioner in this case was arrested by civilian law enforcement officers. The Murphy Declaration was made not by a member of the armed forces but by the head of an executive agency within the United States. The rationale for relaxing the requirements of Due Process is not applicable here. Not surprisingly, the Government in this case brazenly failed to offer any evidence to the trial court showing that it would be unduly burdensome for them to produce more reliable evidence.

Further, even if the Murphy Declaration were deemed admissible, it is hopelessly insufficient to provide Petitioner with "a meaningful opportunity to contest the factual basis for [his] detention before a neutral decisionmaker," as due process demands. *Hamdi*, 542 U.S. at 509. After wrongly admitting the Murphy Declaration, the district court below ruled that, because Petitioner responded with only a general denial, Petitioner had not met his burden to rebut the government's evidence with more

persuasive evidence. This is ridiculous, of course, because the paltry allegations in the Murphy Declaration render impossible a more specific rebuttal. How can Petitioner possibly rebut "evidence", (more accurately described as naked assertions) the factual basis for which has not been disclosed in even the most general terms?

If this Court adopts the position of the Government and allows the President the practically unchecked power to detain Petitioner on such bare and unsubstantiated assertions as those found in the Murphy Declaration, it would surely disfigure the very liberties that we purport to be defending. In this regard, it bears to mention the prudent and centuries old admonition of Benjamin Franklin, one of the founding fathers of this great nation, particularly germane to the issues confronting this court today: "[t]hey who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety." Benjamin Franklin & William Temple Franklin, *Memoirs of the Life and Writing of Benjamin Franklin* 270 (A. J. Valpy 1818).

**PRAYER FOR RELIEF**

For the above reasons, the decision of the United States Court for the Twelfth Circuit holding that the President has the authority under the AUMF and the Constitution to detain Petitioner as an enemy combatant should be **REVERSED**, and the holding that the process afforded to Petitioner by the United States District Court for the District of West Dakota was insufficient to satisfy his Due Process rights under the Constitution should be **AFFIRMED**.

Respectfully submitted,

Team No. 08-11144

*Counsel for Petitioner*

## **APPENDIX 1**

### **Declaration of John R. Murphy Director, Joint Intelligence Task Force for Combating Terrorism**

1. I, John R. Murphy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

#### **Preamble**

2. I submit this Declaration for the Court's consideration in the matter of Ahmed v. United States, pending in the United States District Court for the District of East Dakota.

3. Based on the information that I have acquired in the course of my official duties, I am familiar with all the matters discussed in this Declaration, and all of the information regarding Burhan Uddin Ahmed gathered by the Federal Bureau of Investigation (FBI) and by personnel of the Department of Defense (DoD) once the DoD took custody of Ahmed after he was declared an enemy combatant by the President of the United States.

#### **Declaration of Ahmed as an Enemy Combatant**

4. The President of the United States declared Ahmed an enemy combatant on June 13, 2003. The President made this determination based on intelligence gathered and analyzed through the cooperation of several Executive Branch agencies.

#### **Ahmed's Background and Training**

5. Ahmed is a Pakistani citizen.

6. Ahmed attended an al Qaeda-run terrorist training camp in Afghanistan for 18 months between 1996 and 1998. He was trained in the use of poisons.

7. In Afghanistan, Ahmed cultivated relationships with senior al Qaeda leaders, including Osama Bin Laden and Khalid Sheikh Muhammad.

8. Ahmed legally entered the United States with his family on September 8, 2001. He was ostensibly in the United States to pursue a doctorate in veterinary medicine at Wilson University in Wilson, East Dakota. When he was arrested by the FBI in January 2002, he was in failing status at the university due to his consistent absenteeism.

#### **Ahmed's al Qaeda Activities**

9. Ahmed was commissioned by al Qaeda to enter the United States as a sleeper agent. While in Afghanistan Ahmed met personally with Osama Bin Laden. Ahmed volunteered to be an al Qaeda martyr or to do whatever else was asked of him. He was sent to the United States to establish cover as a sleeper agent.

10. In the United States, Ahmed received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator of 9/11.

11. Ahmed acted as a contact point for al Qaeda operatives newly arriving in the United States. In addition, Ahmed was instructed to investigate the plausibility of hacking into the main-frame computer systems of the Social Security Administration with the objectives of creating chaos in the United States's social safety net and securing revenue for future terrorist attacks through Social Security fraud.

### **Analysis of Laptop Computer**

12. The FBI conducted a forensic examination of Ahmed's laptop computer. The investigation revealed that Ahmed was conducting research regarding use of chemicals as weapons of mass destruction.

13. The highly technical information found on Ahmed's laptop far exceed the interest of a merely curious individual, and rather is consistent with the documented interests of al Qaeda and other terrorist groups.

14. Ahmed's laptop also contained several computer programs typically utilized by computer hackers, and bookmarked websites devoted to computer hacking.

15. In addition, the laptop analysis revealed computer files containing Arabic lectures by Bin Laden and his associates on the importance of jihad and martyrdom, and the merits of the Taliban regime in Afghanistan.

### **Telephone Communications**

16. After September 11, 2001, calling cards and cellular phone accounts attributed to Ahmed were used to attempt to contact a high-ranking al Qaeda officer known to be residing in the United Arab Emirates. Calls to the same number were made by several pay phones in the Wilson, East Dakota area.

### **Social Security Card Theft**

17. In Ahmed's laptop carrying case, a handwritten list of Social Security numbers and the names of their holders. All of

the approximately 40 cards were issued to persons other than Ahmed.

18. During the forensic examination of Ahmed's computer, evidence of efforts to sell Social Security numbers was discovered.

### **Conclusion**

19. In conclusion, this joint investigation has turned up sufficient evidence to determine that Ahmed was an active al Qaeda agent at the time he entered the United States. After entering the country, he engaged in conduct in preparation for acts of international terrorism intended to cause injury to the United States. Ahmed's status has been carefully and thoroughly reviewed, and it has been determined that Ahmed represents a continuing grave threat to the United States. Ahmed must be detained to prevent him from aiding al Qaeda in its efforts to attack and harm the United States.

JOHN R. MURPHY

Director, Joint Intelligence Task Force for Combating  
Terrorism

Executed on 15 August 2004 in Washington, D.C.