

No. 08-11144

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

Burhan Uddin Ahmed,

Petitioner,

v.

United States of America,

Respondent,

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

BRIEF FOR THE PETITIONER

Competitor Number 7516

Counsel for the
Petitioner

QUESTIONS PRESENTED

1. Whether the Executive can indefinitely detain a United States civilian resident without charge under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF) or the Constitution when it has only alleged that he committed Social Security fraud for al Qaeda.

2. Did the district court afford Ahmed due process in determining that he could be detained indefinitely based on his inability to disprove the government's allegations?

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JURISDICTION

On October 2, 2009, this Court granted the Petition for Writ of Certiorari. The jurisdiction of this Court rests on 28 U.S.C. § 2241 (2006).

STANDARD OF REVIEW

This Court accepts the factual findings of the district court unless they are clearly erroneous. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). When this Court interprets the United States Constitution, questions of law are subject to de novo review. *Id.*

CONSTITUTIONAL AND STATUTORY PROVISIONS

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

In November 2002, Ahmed, a civilian resident, was charged in the District of East Dakota with the possession of counterfeit Social Security cards with intent to defraud. Record 7. He was later charged in January 2003 with making a false statement to the FBI. *Id.* Ahmed pleaded not guilty to both charges. *Id.* The district court set trial for July 2003. *Id.* Ahmed filed a pretrial motion to suppress evidence he asserted was obtained by government torture. *Id.*

But two days before his scheduled pretrial hearing, an order signed by the President of the United States was produced. Record 7. This order declared that the President "had determined" for the court that Ahmed was an enemy combatant who had associated with al Qaeda and engaged in acts of terrorism. *Id.* It also stated that Ahmed possessed intelligence that would help the United States defeat al Qaeda and that he represented a continuing threat to the country. *Id.* The government produced no corresponding proof of any of these allegations at that time. *Id.* The military then transferred Ahmed to its custody, where it has held him ever since without "charge or trial." Record 8.

Following the transfer, Ahmed filed for habeas relief in federal district court. *Id.* He asserted that the military held him unlawfully and that he must either be released or given the chance to defend any charges made against him. *Id.* In Ahmed's

habeas hearing, the government, for the first time, produced the Murphy Declaration, a hearsay document that the government alleged justifies its hasty action. *Id.* In this document, the government did not allege that Ahmed was involved in any plot to commit a crime of violence against the United States or its citizens. Record 47. The government's allegations only indicate that Ahmed may have been involved with Social Security fraud. *Id.* Furthermore, the government submitted no further evidence besides the Murphy Declaration to prove its assertions. Record 9.

The district court determined that the Murphy Declaration provided Ahmed with sufficient notice of the charges against him and gave him 60 days to present rebuttal evidence. *Id.* During this 60 days, Ahmed remained in military detention. *Id.* He responded with a general denial and insisted that he should not have to prove his own innocence. *Id.* at 8-9. The district court determined that because Ahmed was unable to produce evidence to prove his innocence, his petition for habeas relief must be dismissed. *Id.* at 9. Ahmed appealed, and this Court agreed to hear the case en banc. *Id.* Ahmed argues that the government has no authority to detain him and that he has been denied due process of law.

SUMMARY OF THE ARGUMENT

The petitioner, Burhan Uddin Ahmed, is a civilian legally residing within the United States. The Fifth Amendment guarantees him the right to due process. His indefinite detention by the executive branch conflicts with this right. Accordingly, this Court should find that Ahmed's indefinite detention is unlawful.

Congress has not authorized Ahmed's detention under the AUMF. The AUMF does not apply to Ahmed because Ahmed did not assist in the September 11th attacks, harbor those who did, or fight in an enemy army. The AUMF never mentions indefinite detentions.

While a plurality of this Court in *Hamdi v. Rumsfeld* found that the AUMF authorized some indefinite detentions, *Hamdi's* narrow holding does not apply to Ahmed. This Court found that the AUMF applies to only enemy-combatant Taliban fighters captured on foreign soil. Since Ahmed is a civilian resident who was arrested in East Dakota on suspicions of social security fraud, *Hamdi* does not apply.

Congress has demonstrated its position against indefinite detentions under the plain language of its laws including the Patriot Act. Therefore, the Executive's detention of Ahmed is against the will of Congress. Furthermore, Ahmed is not an enemy combatant. Accordingly, Ahmed's indefinite detention by the

Executive violates the Constitution.

Even if this Court extends *Hamdi*, Ahmed's indefinite detention cannot stand. Under *Hamdi*, the district court has denied Ahmed due process for two reasons: (1) The district court misapplied the *Hamdi* plurality's dicta regarding the use of hearsay evidence; and (2) The district court failed to properly consider Ahmed's civilian capture in performing its balancing analysis.

The Court has determined that due process requires the government to provide a defendant (1) notice of the crimes of which he is accused, (2) a hearing in which to defend himself, and (3) a neutral decision-maker to determine his fate. In doing so, the government must meet its burden of proof before the defendant must prove his innocence. Here, the government has failed to meet this burden.

In *Hamdi*, a plurality stated that hearsay evidence *may* be the most reliable evidence against a detainee in a habeas proceeding. The district court misinterpreted this permissive statement as a bright-line rule. The Court should find this interpretation is inconsistent with the language of *Hamdi* and that under the facts of this case, more reliable evidence is required.

Second, the district court failed to note that the risk of erroneous deprivation of Ahmed's liberty was greater than that

in *Hamdi*. Ahmed was arrested in the United States for a civilian crime and detained in civilian prison. Days before he was set to go to trial, the military whisked Ahmed away, bypassing the process that he was due. The Court should find that Ahmed was entitled to more process than he received.

ARGUMENT

This Court should reverse the Twelfth Circuit's decision because the Executive has no authority to detain Ahmed. Furthermore, this Court should find that the process laid out by the district court denies Ahmed due process.

I. Neither the AUMF nor the Fifth Amendment allows the Executive to indefinitely detain Ahmed because he is a U.S. civilian resident who did not aid the September 11th attackers, harbor those who did, or fight in an enemy army.

The Fifth Amendment of the United States Constitution ensures that "person[s]" residing within the United States cannot be deprived of liberty without "due process of law." U.S. CONST. amend. V. This protection extends to all persons including aliens and is not limited to citizens. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). It prohibits the government from indefinitely detaining a person without trial or a grand jury's indictment "except in cases arising in land or naval forces, or

in the Militia, which in actual service in time of War or public danger." U.S. CONST. amend. V. This Court is not faced with a case involving land or naval forces. *See* Record 47–48. It is not faced with a case involving a militia. *See id.*

This Court is faced with the question of whether the Constitution permits the Executive to indefinitely detain a civilian legally residing on U.S. soil on the basis of hearsay allegations. Record 5–6, 13. Specifically, the question is whether the Constitution allows for indefinite detention when the Executive alleges that a U.S. resident has conspired with al Qaeda to commit acts of terrorism. *Id.* The conspiracy that the government alleges in this case is one of Social Security fraud rather than a violent attack. Record 47–48. This Court should find that the Fifth Amendment prohibits indefinite detention under these circumstances.

This Court should follow the plain meaning of the Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) ("AUMF"). Under the plain meaning of the AUMF, this Court should find that Congress has not given the Executive the authority to indefinitely detain U.S. residents alleged to have ties to al Qaeda. This Court should also find that the Executive has no independent authority to detain Ahmed as Commander-in-Chief of the military or under the War Powers clause. *See* U.S. CONST. art. I, § 8, cl. 2 (giving Congress the

sole authority to declare war). This Court should find that the President lacks such authority because Ahmed has not associated himself with the army of a nation at war with the United States. *See id.*; Record 47–48 (alleging Ahmed had ties to a terrorist organization but not to the Taliban government). As Justice Scalia has stated, “The very 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 v. Rumsfeld*, 542 U.S. 507, 554–555 (2004). Accordingly, this Court should reverse the decision of the Twelfth Circuit and find that the Executive’s unilateral and indefinite detention of Ahmed is unconstitutional.

A. Under the plain meaning of its text, the AUMF does not apply to Ahmed because the government has not alleged that he aided in the September 11th terrorist attacks or harbored those who did.

Under the plain meaning of the AUMF, Congress did not grant the President the power to indefinitely detain Ahmed, a U.S. civilian resident who was not a party to any terrorist attack on this country. *See* Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001). When it passed the AUMF, Congress explicitly approved of necessary and appropriate actions to combat those who took part in the terrorist attacks

of September 11th, 2001 ("9/11"). Section (a) of the AUMF states:

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. *Id.* (emphasis added).

The government has not provided any evidence or even alleged that Ahmed planned, authorized, committed or aided in the 9/11 attacks. *See* Record 47–48. Furthermore, the government has never produced evidence or even alleged that Ahmed harbored those who were responsible for the 9/11 attacks. *See id.* The government has only alleged that Ahmed was involved in Social Security fraud. *See id.* Therefore, Congress has not given the President the explicit authority to indefinitely detain Ahmed.

The AUMF does not mention indefinite military detention. *See* Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001). However, a plurality of four justices and one dissenting justice of this Court found that the AUMF may authorize detentions under very narrow circumstances. *Hamdi*, 542

U.S. 517, 587. In *Hamdi*, the plurality found that the AUMF did give the Executive the authority to detain members of Taliban forces who were presently engaged in hostilities with U.S. soldiers in Afghanistan. *Id.* It found that such detentions were permissible under the AUMF once it was sufficiently clear that the detainee was an enemy combatant. *Id.* at 523. This Court narrowed its holding to include only Taliban fighters captured on foreign soil. *Id.* at 519. It explicitly stressed the fact that the capture of Hamdi, a U.S. resident, was made on foreign soil in an area where the U.S. Army was fighting a war. *Id.* at 523.

Ahmed's case is distinguishable from Hamdi's case in many ways. Unlike in *Hamdi*, the government has not alleged that Ahmed is a member of the Taliban. *See* Record 6–7, 47–48. Nor has it produced evidence or even alleged that he engaged in hostilities with the U.S. military in Afghanistan. *See id.* *See* Record 6–7, 47–48. Furthermore, Ahmed was arrested within the United States. *Id.* The Murphy Declaration, the hearsay evidence that the government bases its allegations on, does not indicate that he was involved in any plot to commit acts of violence similar to the 9/11 attacks. *Id.* While it does allege that Ahmed was conducting Internet research on weapons of mass destruction, it doesn't indicate that Ahmed ever had or planned to use such weapons. *Id.* Furthermore, it does not indicate that indefinite

detention is necessary to prevent Ahmed from rejoining an enemy nation's army. *Id.* It only alleges that Ahmed was involved in Social Security fraud. *Id.*

These distinctions are important ones under the AUMF and *Hamdi*. The AUMF may give the Executive congressional authority to detain Taliban fighters because they are fighting this country in the service of a government that harbored those involved in the 9/11 attacks. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). However, it does not give the Executive the power to indefinitely detain Ahmed because the government has not shown that Ahmed was ever involved in the 9/11 attacks or with the Taliban forces in Afghanistan. See Record 6-7, 47-48. The AUMF explicitly covers those who harbor the 9/11 attackers. See *id.* It never authorizes the indefinite detainment of every or any U.S. resident alleged to have ties to al Qaeda. See *id.*

In this case, the government has only produced hearsay evidence that Ahmed was conspiring with al Qaeda to commit Social Security fraud. See Record 6-7, 47-48. In contrast, the government alleged that Hamdi was an enemy Taliban fighter in a war zone. See *Hamdi* 542 U.S. 509-514. Accordingly, this Court's narrow holding in *Hamdi* does not apply to Ahmed. See *id.* (explicitly restricting this Court's holding to the "narrow circumstances" of Hamdi's case). Therefore, Ahmed should be

afforded full due process rights as a U.S. civilian resident.

B. The Fifth Amendment prohibits the Executive from indefinitely detaining Ahmed against the will of Congress because it has not shown Ahmed to be an enemy combatant.

The Executive's independent powers under the Constitution do not include the power to indefinitely detain Ahmed because he is a civilian resident of the United States. See Record 47–48; U.S. CONST. art. I, § 8, cl. 2 (giving Congress the sole authority to declare war). While the Executive has declared Ahmed to be an enemy combatant, he has not shown that Ahmed has fought against U.S. soldiers or was affiliated with an enemy nation's army. See Record 47–48. In assessing whether the President's actions have exceeded his constitutional authority, this Court has looked for congressional authorization. See *e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy J., concurring); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”). In contrast, when the President takes an action that Congress opposes, his power is at its lowest level. See *id.* In this case, the President's power to detain a U.S. resident

within the country is at its lowest level because his decision to indefinitely detain Ahmed is against the will of Congress. See *id.* Furthermore, the Constitution does not grant the President the power to detain Ahmed because Ahmed was not taken as a prisoner of war or as a proper enemy combatant. See Record 47–48; U.S. CONST. amend. V. Therefore, the Fifth Amendment provides Ahmed with the right to full due process and prohibits the President from indefinitely detaining Ahmed. See *id.*

1. The Executive's indefinite detention of Ahmed is against the will of Congress.

While the U.S. government was at war with Japan, it detained thousands of U.S. residents of Japanese descent in internment camps. See *Hamdi*, 542 U.S. at 542–543 (Souter J., concurring and dissenting). The Department of Justice was allowed to deprive Japanese Americans of their liberty and their constitutional rights because the government felt their ties to Japan made them a security threat. See *id.* In 1950, Congress passed the Emergency Detention Act of 1950 and allowed the Attorney General to detain anyone thought to be engaged in espionage. See *id.* The Act was used during the Cold-War era to detain many Americans accused of either being communists or having ties to communists. See *id.* This Court held that several portions of that act were unconstitutional. See *Albertson v.*

Subversive Activities Control Bd., 382 U.S. 70, 71 (1965).

Congress has since recognized that the indefinite detention of U.S. citizens and residents is generally wrong even if they are alleged to have ties to an enemy. *See, e.g.*, 18 U.S.C. § 4001(a) (“No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”); Patriot Act § 412(a); *see also* 8 U.S.C.A § 1226(a)(5)(2009).

In 1971, Congress passed 18 U.S.C. § 4001(a) to prevent the executive branch from using the 1950 act to detain more U.S. residents. *See* 18 U.S.C. § 4001(a) (2006); *Hamdi*, 542 U.S. at 542–543 (Souter J., concurring and dissenting). The statute specifically forbids the detention of U.S. citizens without explicit congressional approval. 18 U.S.C. § 4001(a) (2006). The language of the Act indicates a strong congressional sentiment that the Executive's indefinite detention of civilians within the United States is wrong. *See id.*

In the wake of the 9/11 attacks, people of middle-eastern descent became the subject of suspicion and harassment similar to the suspicion that Japanese Americans faced. *See generally* John Tehranian, *The Last Minstrel Show? Racial Profiling, the War on Terrorism and the Mass Media*, 41 CONN. L. REV. 781 (2009). By retaining 18 U.S.C. § 4001, Congress has not chosen to return to the days of the internment camps. *Hamdi*, 542 U.S. at 542 (Souter, J., concurring). Accordingly, when Congress passed the

AUMF, it did not mention indefinite detentions. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Therefore, it did not grant the Executive the authority to indefinitely detain a U.S. resident on the suspicion that he is working with al Qaeda.

The Patriot Act is also representative of Congress's opposition to the indefinite detention of U.S. resident aliens. See Patriot Act § 412(a); see also 8 U.S.C.A § 1226(a)(5)(2009) (emphasis added). It shows that when Congress approves of detentions, it does so explicitly and carefully. See *id.* While the Patriot Act gives the Attorney General the power to detain "terrorist aliens" if they are engaged in activity that threatens national security, it expressly forbids indefinite detentions. See *id.* It specifically states:

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. Patriot Act § 412(a); see also 8 U.S.C.A § 1226(a)(5)(2009) (emphasis added).

Since Congress has made it clear that it does not want the Executive to have the power to indefinitely detain U.S.

residents, this Court should find that the Executive is acting against the will of Congress. Accordingly, any lawful detention of Ahmed would have to stem completely from the Executive's independent powers.

2. The Executive lacks the independent power to indefinitely detain Ahmed because Ahmed is not an enemy combatant.

While the Executive's independent power to detain some individuals may increase in times of war or great emergency, it is still very limited. *See Ex Parte Milligan*, 71 U.S. 2, 6 (1866). In *Milligan*, this Court found that the indefinite detention of U.S. civilian residents is unconstitutional even in situations involving traitorous terrorist activity. *Id.* This Court invalidated the President's order to detain a U.S. resident suspected of subversion and of aiding the enemy, the Confederate Army, during a time of civil war. *See id.* at 121–122. While *Milligan* was accused of aiding Confederates, he was not an official member of the Confederate Army or a resident of a Confederate state. *See id.* at 2–10. Accordingly, this Court found that he should be treated as a civilian despite the fact that he was accused of conspiring with the enemy. *See id.* 121–122. (“One of the plainest constitutional provisions was, therefore, infringed when *Milligan* was tried by a court not

ordained and established by Congress, and not composed of judges appointed during good behavior.”). Similarly, Ahmed should be tried in a civilian court of law in accordance with his due process rights under the Fifth Amendment.

In cases where the detainees were more clearly part of the military arm of a nation at war with the United States, this Court has upheld the detentions. *See, e.g., Ex Parte Quirin*, 317 U.S. 1, 37–38 (1942). In contrast to *Milligan*, the petitioners in *Quirin* were paid and instructed to carry out acts of espionage by the German military during a time of war with Nazi Germany. *See id.* at 45. Accordingly, this Court has distinguished the detention of civilians from the detention of enemy-military combatants. *See id.* While the detainees in *Hamdi* and *Quirin* were members of a recognized enemy-military force on a field of battle, the detainee in *Milligan* was not. *See id.; Hamdi*, 542 U.S. at 522; *Milligan*, 71 U.S. at 6.

In *Hamdi*, this Court distinguished Hamdi's capture from Milligan's. It wrote: “Had Milligan been captured while he was 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. Like Milligan, Ahmed was not captured while he was assisting enemy soldiers or serving in an enemy army. Neither Milligan nor Ahmed were taken as prisoners of war. Accordingly, this Court should

find that Ahmed's indefinite detention falls into the *Milligan* category of unlawful detentions, reverse the decision of the Twelfth Circuit, and find that the indefinite detention of Ahmed is unconstitutional.

II. If this Court extends *Hamdi*, then it should find that the district court misread *Hamdi's* dicta regarding hearsay evidence and misapplied its balancing test.

Under the Constitution, Ahmed is entitled to procedural due process before the government can deprive him of his liberty, a right upon which this country was founded. See *U.S. v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."). The Fifth Amendment requires that no person be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V.

The Supreme Court laid out the process due for balancing an individual's Fifth Amendment interest against a government efficiency interest in *Mathews v. Eldridge* 424 U.S. 319, 325 (1975). The *Mathews* test states that process due is determined by weighing the private interest at stake against the government's asserted interest and the burdens the government would face in providing greater process. *Hamdi v. Rumsfeld*, 542

U.S. 507, 529 (2004).

In *Hamdi*, a plurality of the Supreme Court held that due process applies in the enemy-combatant context. *Hamdi*, 542 U.S. at 533. The Court then created a framework for testing due process in enemy-combatant habeas proceedings. *Id.* The district court skirted this framework when it simply decided that the government's hearsay evidence shifted the burden of proving his innocence to Ahmed. Record 9. The Court should properly apply this framework, which compels the decision that Ahmed was entitled to further process than he received.

Under the *Hamdi* test, proceedings can be tailored to limit potential burden to the military process so long as the government provides: (1) notice of the facts alleged against the detainee, (2) a "fair opportunity to rebut the Government's factual assertions," and (3) a hearing before "a neutral decision-maker." *Hamdi*, 542 U.S. at 533.

In order to provide notice, the government must first put forth "credible evidence that the detainee meets the enemy-combatant criteria." *Id.* at 534. If the government gives proper notice, "the onus [shifts] to the petitioner to rebut the evidence with more persuasive evidence that he falls outside the criteria." *Id.* at 534. The detainee is also entitled to a hearing before a neutral decision-maker who weighs the detainee's evidence against the government's evidence in

articulating a decision. *Id.* at 533.

Although Hamdi was a United States citizen, language in *Rasul v. Bush*, a case decided the same day as *Hamdi*, states that the federal habeas statute applies to all those held in federal courts, regardless of citizenship. *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (“Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the territorial jurisdiction of the United States.”).

In *Hamdi*, the plurality decision, in laying out the due process framework in the habeas arena, refers to the Geneva Convention, indicating that this Court foresaw application of its principles to non-citizen detainees. *Hamdi*, 542 U.S. at 538 (“[I]t is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.”).

The Court also noted that its decision was tied to the specific facts of *Hamdi*. 542 U.S. at 539. Hamdi was arrested on the battlefield in Afghanistan and turned over to the United States military, which initially interrogated him in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay. *Id.* at 510. He was later detained in Norfolk,

Virginia and Charleston, South Carolina. *Id.* Hamdi's father filed a petition for habeas corpus. *Id.* at 511. The district court reviewed the petition and held that if Hamdi was "indeed an enemy combatant who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Id.* at 512.

In response, the government filed a motion to dismiss the petition, accompanied by a hearsay document containing the only evidentiary support for the government's position. *Id.* The document listed information about Hamdi's alleged Taliban affiliations that served as the basis for his detention. *Id.* at 513. But Hamdi's capture on the battlefield in Afghanistan supported the hearsay document's allegation. *Id.* at 513. Because of this, the Supreme Court determined that a court in an enemy-combatant case similar to *Hamdi* could accept credible hearsay evidence like that seen in *Hamdi*, "so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return." *Id.* at 538.

Like *Hamdi*, the case at hand is a habeas petition. Record 5. Both prisoners were detained during times of war based on alleged connections to terrorist groups. *Id.* at 6. Both prisoners contested the use of hearsay evidence against them in habeas proceedings. *Id.* at 9-10. Based on these facts, the *Hamdi* due-process balancing test can apply to the case at hand. *See*

Hamdi, 542 U.S. at 533. However, because the circumstances of capture are very different, application of the same test to both cases compels different results.

If the Court applies *Hamdi* to Ahmed's detention, it should adopt the court of appeals' decision that the district court decision does not provide Ahmed with the process he is due under the Fifth Amendment. Record 28. The district court (1) misread *Hamdi's* dicta regarding the use of hearsay evidence in enemy-combatant habeas proceedings and (2) failed to properly conduct the interest-balancing test clearly laid out by the plurality in *Hamdi*.

A. The district court misread *Hamdi's* dicta regarding hearsay evidence.

The district court erred in accepting the government's hearsay evidence as sufficient to shift the burden of proving his innocence to Ahmed under the test articulated in *Hamdi*. See Record 9. Had the court properly performed this test, it would have been compelled to ask the government to present additional evidence supporting its claims or substitute credible evidence. See *Hamdi*, 542 U.S. at 538-39. The Court should find that the district court incorrectly allowed the government's hearsay evidence to shift the burden of proving his innocence to Ahmed. See *id.*

In *Hamdi*, this Court determined that under the specific facts of the case, a hearsay document was sufficient to meet the government's burden, thus shifting the burden to Hamdi to prove his own innocence. *Id.* The district court in Ahmed's case interpreted *Hamdi's* dicta regarding hearsay as a "rigid procedural protocol to be imposed in every enemy combatant habeas proceeding." Record 23. The Court should find that this interpretation was wrong.

Under *Hamdi*, while "essential constitutional promises may not be eroded," some processes *may* be compromised in the enemy-combatant context depending on the specific facts of the case. *Hamdi*, 542 U.S. at 533. The *Hamdi* plurality stated only that hearsay "may need to be accepted as the most reliable available evidence" based on the "exigencies of the circumstances." *Hamdi*, 542 U.S. at 533-34. Hearsay therefore *may* provide "the most reliable available evidence" and therefore *may* be sufficient to trigger a shift of the burden to the detainee to prove his innocence.

However, it does not follow, as the district court assumed, that under the language of *Hamdi*, the introduction of hearsay evidence is automatically sufficient to shift the burden to the detainee. *See id.* The scheme set forth in the specific situation must "meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove

military error." *Id.* at 534. An automatic assumption that hearsay evidence may be used to trigger the burden shift does not meet this stated goal.

In *Hamdi*, before deciding that the hearsay was sufficient, this Court engaged in a three-step balancing test laid out by *Mathews. Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). Before compromising such process, the Court must consider (1) "the risk of erroneous deprivation" of the detainee's liberty interest, (2) "the probable value . . . of any additional or substitute procedural safeguards," and (3) the possibility that additional or substitute evidence may be available. *Id.* (quoting *Mathews*, 424 U.S. at 335). The *Hamdi* plurality considered the context of Hamdi's capture and the burdens that might be imposed upon military operations before determining that certain processes might be "unworkable and inappropriate in the enemy-combatant setting." *Hamdi*, 542 U.S. at 535.

The district court in this case failed to properly apply the analysis laid out in *Hamdi*. Record 9. In simply accepting the hearsay document on its face, the district court did not consider the special risk of erroneous deprivation of Ahmed's liberty interest, the probable value of any additional or substitute procedural safeguards, or the possibility of introducing additional or substitute evidence. Record 24-25. Because some of Ahmed's alleged affiliations occurred in the

United States and because he was originally detained in civilian custody for non-military crimes, the circumstances in *Hamdi* requiring the use of hearsay evidence simply didn't exist. See Record 7. Instead of meeting its burden of proof in civilian court, the government whisked Ahmed off to military custody just days before he was to stand trial, based only on vague allegations "determined for the United States of America" by the president. *Id.*

The district court simply assumed that the hearsay evidence was sufficient. Record 23. At the district court, the government failed to demonstrate that the Murphy Declaration was the most reliable evidence reasonably available. *Id.* The government did not show that it was unable to produce other evidence "without unduly burdening its interests, or that a relaxed evidentiary standard was necessary in light of the specific facts of this case." Record 24.

This Court should determine that the district court failed to properly balance the interests in accepting the hearsay evidence to shift the burden of proving his innocence to Ahmed.

B. The district court failed to properly weigh the circumstances of Ahmed's capture in performing its balancing analysis.

This Court should also find that the district court did not properly perform the balancing test laid out in *Hamdi*. See

Record 9. Under *Hamdi*, due process in the enemy-combatant setting requires weighing the detainee's liberty interest against the government's stated interest. Record 25. In applying this balancing test, the district court did not properly consider the increased risk of erroneous deprivation of liberty due to the circumstances of Ahmed's capture. Record 26-28. A proper analysis compels the conclusion that in Ahmed's case, the risk of erroneous deprivation is much greater than that seen in *Hamdi. Id.*

In America, "liberty is the norm" and detention without sufficient reason "is the carefully limited exception." *U.S. v. Salerno*, 481 U.S. 739, 755 (1987) (challenging a statute that permitted courts to detain a defendant prior to his trial). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). In fact, "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963).

Because the liberty interest is a fundamental element of American law, procedural process is meant to protect individuals

not from losing their freedom but from "the mistaken or unjustified deprivation." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

Without evidence that the individual presents an immediate danger to himself or others, it is a violation of due process to detain him against his will. See *Foucha*, 504 U.S. at 71. In *Foucha*, the Supreme Court overturned a Louisiana statute that allowed an individual "to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness." *Id.* at 71. Because the state had failed to prove that the individual was dangerous, he could not be detained without violating due process. *Id.* at 72.

Proof of dangerousness cannot be based upon circumstantial or ethnic affiliations. See H.R. Rep. No. 92-116, pp. 2, 4-5 (1971) (overturning the Emergency Detention Act of 1950, a Cold War statute, which allowed the government to detain individuals reasonably thought likely to engage in espionage or sabotage). Congress overturned the Emergency Detention Act "out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry." *Hamdi*, 542 U.S. at 542 (Souter, J., concurring). Congress intended to prevent a constitutional dilemma like that seen in *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding laws restricting the

rights of Japanese Americans based on widespread fear of the Japanese after the December 7, 1941 attacks on Pearl Harbor). Although the Supreme Court has never specifically overturned the holding in *Korematsu*, Congress's comments distancing itself from *Korematsu's* unfortunate outcome show a rededication to due process values in this country, even in times of war. See *Hamdi*, 542 at 535 ("[I]t does not infringe on the core role of the military for the courts to exercise their time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.").

Additionally, in the enemy-combatant context, "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case." *Id.* In *Hamdi*, the circumstances of Hamdi's capture made an erroneous deprivation of freedom less likely. *Id.* at 538. In 2001, Hamdi, who lived in Afghanistan, was seized by members of a militant organization called the Northern Alliance in Afghanistan and was then turned over to United States forces. *Id.* at 512. The government alleged that Hamdi remained with a Taliban unit after 9/11 and that he surrendered an assault weapon at the time of his capture. *Id.* at 513. The Court determined that the government had met its burden based on these circumstances of capture, which supported the allegations in the government's

hearsay document. See *id.* at 539.

Like in *Hamdi*, Ahmed was arrested based on alleged affiliations with a terrorist group. Record 7. However, unlike in *Hamdi*, Ahmed was not arrested in an active war zone. *Id.* Ahmed was transferred into, rather than out of, military custody. *Id.* Ahmed was first detained by federal agents within the United States in the state of East Dakota, where he was attending veterinary school, not brandishing an assault weapon. *Id.* He was charged with non-military crimes in federal district court. *Id.* Ahmed pleaded not guilty to these charges and sought to suppress the use of evidence he alleged was obtained by torture. *Id.* Four days before his trial was scheduled, the government produced an order signed by the President of the United States, stating that the President had "determined for the United States of America" that Ahmed was an enemy-combatant. Record 7. Based on this determination, Ahmed was transferred to military custody for the first time. *Id.* Ahmed's criminal trial never took place, and the military still holds Ahmed indefinitely. *Id.* at 8.

Under the circumstances of Ahmed's detention, there exists a much higher probability of erroneous deprivation than that seen in *Hamdi*. See Record 7. Ahmed was not captured on a battlefield or in the midst of an ongoing conflict, where he held a weapon or otherwise presented an immediate danger to

others. See *Foucha*, 504 U.S. at 80. Moreover, the government has offered no credible proof that Ahmed presents an immediate danger to others. See Record 24. Because he was not captured in such a place, allegations of his involvement with military action are more far-fetched. See *id.* Ahmed was in America to attend school, and he was arrested for civilian crimes, for which he never had the opportunity to stand trial before the government whisked him off to military confinement. Record 7-8. Ahmed's connection with the military did not exist until the government created it. *Id.*

In this case, a proper consideration of the liberty interest does not support compromising Ahmed's rights to due process.

CONCLUSION

Congress did not authorize Ahmed's indefinite detention when it passed the AUMF. The AUMF only applies to those who aided in the 9/11 attacks or harbored those who did. The government has not alleged that Ahmed has done either. Accordingly, this Court should find that the AUMF does not apply to Ahmed. Additionally, the Executive does not have inherent authority to detain Ahmed because Ahmed is not an enemy combatant.

Furthermore, the Court should find that the district court

failed to provide Ahmed with due process. The court misapplied *Hamdi's* discussion of hearsay, improperly allowing the Murphy Declaration to shift the burden of proof to Ahmed without further discussion. Also, the district court did not adequately consider that Ahmed was first charged with a civilian crime and not captured on a battlefield as in *Hamdi*.

Therefore, this Court should reverse the decision below.