

No. 08-11144

IN THE
Supreme Court of the United States

BURHAN UDDIN AHMED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the Authorization for Use of Military Force, Pub. S. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes, and if so whether the Constitution allows, the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?
2. Whether the process afforded by the district court to challenge a designation as an "enemy combatant" was sufficient under the requirements of the Fifth Amendment?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals, Twelfth Circuit, were:

Burhan Uddin Ahmed (Appellant) and
United States of America (Appellee).

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OPINION BELOW

The decision of the United States Court of Appeals, Twelfth Circuit, is found at *Burhan v. U.S.*, No. 06-9701 (12 Cir. Nov. 24, 2008).

JURISDICTION

The United States Court of Appeals, Twelfth Circuit, issued its decision on November 24, 2008. The petition for writ of certiorari was granted on October 2, 2009.

STATUTORY PROVISIONS INVOLVED

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

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 (2001) ("Patriot Act").

STATEMENT OF THE FACTS

Soon after the September, 11, 2001, terrorist attacks wherein al Qaeda targeted prominent American locations, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"); (R at 6.)

A few days prior to the al Qaeda attacks, Burhan Uddin Ahmed moved from his homeland of Pakistan to the United States in order to attend veterinary school in East Dakota. (R at 7.) After living in the United States for over a year, Ahmed was arrested on civil charges for social security fraud and making a false statement to the FBI. (R at 7.) Only two days prior to his initial District Court hearing, the President designated Ahmed an "enemy combatant" and ordered his detention at a military facility. (R at 7.) The District Court of East Dakota dropped all criminal charges and Ahmed was transferred into military custody "without charge or trial." (R at 7-8.)

Ahmed filed for a writ of habeas corpus in East Dakota, asserting that the government could not detain him without filing criminal charges or at least giving him a hearing in which he could challenge the factual basis for his classification as "enemy combatant". (R at 8.)

The government said that Ahmed had an opportunity to challenge his classification as "enemy combatant" and presented the Murphy Declaration, a hearsay document outlining all the government's reasons for detaining Ahmed. (R at 8.) John Murphy, author of the Murphy Declaration, asserted that Ahmed had personal relationships with known al Qaeda leaders and had entered the United States with the intent to commit acts of terror while in the country. (R at 9.)

The District Court of East Dakota ruled that Ahmed could be detained but stated that he had the right to "challenge the factual basis of his detention . . . consistent with due process rights." (R at 9.) A magistrate judge then determined that the burden-shifting process already afforded Ahmed was sufficient Due Process; if he would not prove his innocence by providing evidence to the government, his detention was justified. (R at 9.)

Ahmed contended that he had a constitutional presumption of innocence and refused to prove his innocence; instead, he appealed the ruling to the United States Court of Appeals Twelfth Circuit. (R at 10.) The Court of Appeals provided a plurality ruling in which they determined that Ahmed's detention was authorized under the AUMF but that the review process afforded Ahmed was not sufficient to satisfy Ahmed's Fifth Amendment Due Process rights. (R at 28.) Ahmed now appeals that

ruling and petitions for further clarification on the rules under which a legal resident may be detained and the Due Process afforded him by the Constitution. (R at 1.)

SUMMARY OF ARGUMENT

It has long been accepted that the Fifth Amendment right to Due Process is extended to aliens legally residing within the United States. These rights are limited in situations where either Congress or the Constitution grant the President authority to detain individuals designated as "enemy combatants." In order to strip an individual of his reasonably expected Due Process rights, authorization must be found in either of these forms. In this case, neither Congress nor the Constitution allow Ahmed's indefinite detention based on the allegations against him.

The government contends that the AUMF is the means by which Congress has authorized Ahmed's indefinite detention. However, the AUMF does not explicitly authorize detention of individuals. Rather, recent case law has noted that detention may be justified through the AUMF only if an individual can adequately be designated an "enemy combatant." This case law further notes that an individual may be designated an "enemy combatant" if he is part of a military arm of an enemy nation *and* has engaged in an armed conflict against the United States.

Ahmed legally entered the United States as a citizen of Pakistan, a country with whom the United States is at peace. Ahmed's alleged affiliation is with a rogue terrorist organization and not with a traditional enemy nation. Further, Ahmed has not taken up arms against the United States. Rather, the allegations against Ahmed solely regard his potential involvement in future acts.

The President does not have constitutional authority to indefinitely detain Ahmed. The government has contended that if the AUMF doesn't grant this authority, the Constitution does. However, the President lacks constitutional authority to act directly against the expressed wishes of Congress. Through the Patriot Act, Congress has forbidden the detention of enemy aliens if the detention appears to be indefinite.

The United States is engaged in a war with an organization that is no longer affiliated or sponsored by any one government. Rather, the association is made up of terrorist volunteers, often acting by their own initiative, spread throughout the world. As a result, the detention of any individual, such as Ahmed, for the duration of the War on Terror appears to be indefinite in nature and therefore a clear violation of Congress's wishes as expressed through the Patriot Act. Therefore, Ahmed's indefinite detention is an unauthorized violation of his constitutional rights.

In addition, the Court should clarify that the constitutionally minimal standard of Due Process as outlined in *Hamdi* does not provide sufficient Due Process for all individuals classified as "enemy combatants." Rather, each case must receive a fact specific determination for Due Process.

The constitutional minimum for Due Process requires that an individual receive notice of the factual basis for their classification as "enemy combatant" and have a fair opportunity to rebut that evidence before a neutral decision maker. The District Court of East Dakota erroneously ruled that use of hearsay evidence and application of a burden-shifting scheme was appropriate in Ahmed's case merely because such departures from traditional constitutional law had been ruled appropriate in another case dealing with an enemy combatant, supported only by a plurality. Nevertheless, the Court determined over 50 years ago that Due Process is a case-specific determination and Ahmed's case surely does not justify the application of the constitutional minimum protection of this right.

Further, even if the constitutional minimum for Due Process rights is applied, the facts surrounding Ahmed's detention do not justify the use of hearsay evidence and the implementation of a burden-shifting scheme. Ahmed was detained while legally residing in the United States and had not taken up arms against this nation. Regardless of his designation as an "enemy

combatant", Ahmed should not be afforded the minimal Due Process rights afforded to enemy combatants who are captured while actively engaged in war-making endeavors against this country.

ARGUMENT

I. THIS COURT SHOULD OVERTURN THE DECISION OF THE LOWER COURT BECAUSE NEITHER THE AUMF NOR INHERENT PRESIDENTIAL CONSTITUTIONAL AUTHORITY AUTHORIZE THE INDEFINITE DETENTION OF INDIVIDUALS LAWFULLY RESIDING WITHIN THE UNITED STATES BASED SOLELY ON ALLEGATIONS OF AL QAEDA AFFILIATION.

The Fifth Amendment right to Due Process of all "person[s]" has been extended to aliens legally residing within the United States. *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896).

Additionally, *United States v. Verdugo-Urquidez* noted that Due Process rights are granted to aliens that "have come within the territory of the United States and developed substantial connections with this country." 494 U.S. 259, 271 (1990).

These Due Process rights have limitations, notably where Congress or the Constitution have granted the President authority to detain individuals designated as "enemy combatants" and thus detain these individuals without criminal process. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). However, the government has incorrectly contended that the AUMF has authorized the detention of a non-enemy combatant lawfully residing within the United States and further contends that the Constitution allows this authorization. The Court should reverse the ruling of the lower court and hold that the AUMF does not authorize the

President to designate Ahmed an "enemy combatant" and therefore Ahmed may not be indefinitely detained without Due Process.

A. The AUMF does not authorize the President to designate individuals as "enemy combatants" when the individuals are not affiliated with an enemy nation, nor have they taken up arms against the United States.

This court should look to the general body of case law outlining the standard by which a person may be designated an "enemy combatant" and therefore may be detained indefinitely. *Ex parte Quirin* noted that when individuals are clearly associated with the military arm at war with the United States, these individuals may be detained as enemy combatants. 317 U.S. 1 (1942). More recent case law has defined "clear association" in these contexts. Particularly, an enemy combatant is one who is: (1) "part of or supporting forces hostile to the United States" and (2) "engaged in an armed conflict against the United States." *Hamdi*, 542 U.S. at 516. Further, the Supreme Court has noted that the AUMF may not authorize military detention "if the practical circumstances of a given conflict" differ from traditional conflicts. *Id.* at 521.

Much of the case law on determining what constitutes "enemy combatant" status relies on the early *Quirin* reasoning which requires a clear association with the military arm of an enemy nation in order to qualify for this status. 317 U.S. at 1. In *Quirin*, because the United States had declared war on Nazi

Germany and because the individual who was detained was being controlled and paid by the Nazi military, the Court found justification to designate the individual an "enemy combatant." *Id.* at 31.

Further clarifying the meaning of "close association" discussed in *Quirin*, the *Hamdi* plurality concluded that a United States citizen found in Afghanistan could be detained as an enemy combatant because the citizen was both "part of or supporting forces hostile to the United States" and "engaged in an armed conflict against the United States." *Hamdi*, 542 U.S. at 516. This AUMF explicit congressional authorization was granted only in the "narrow category" articulated by the Court through this definition. *Id.* at 517.

These determinations were linked to multiple factors, including the citizen's (1) Taliban military weapons training, *id.* at 510; (2) his "[taking] up arms with the Taliban," *id.* at 513; (3) his "[engaging] in armed conflict against the United States," *id.* at 516; and (4) his surrendering weapons upon being captured, *id.* at 513. The Taliban government of Afghanistan had been declared an enemy government and its military arm was clearly at war with the United States. Thus, the factors listed by the *Hamdi* plurality, significant enough to show that the citizen was part of hostile forces and engaged in armed

conflict, were strong and clear justification for the citizen's enemy combatant status.

Articulating again the limited reach of its holding, the *Hamdi* plurality noted that the AUMF only grants authority to detain where it is "sufficiently clear that the individual is, in fact, an enemy combatant." *Id.* at 523. Further, the Court explained that this authorization only extends to traditional conflicts found in the law of war. *Id.* at 521.

Hamdi did not overrule a still-valid *Ex parte Milligan* holding which would not allow the detention of an individual residing in the United States who had not taken up arms against the United States during the Civil War. *Ex Parte Milligan*, 71 U.S. 2, 45 (1866). Rather, this individual had conspired with the enemy to aide in the overthrow of the government. *Hamdi* noted that "[h]ad 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.

More recently this concept has been applied to the War on Terror when the Fourth Circuit held that an individual with terrorist connections could be designated an "enemy combatant." See *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). The Court explained that its holding was not inconsistent with *Milligan*, noting that Padilla had actually "taken up arms against the

forces of the United States on behalf of, an enemy of the United States." *Id.* at 397. As the individual in *Milligan* had not gone nearly as far as Padilla, the Court reaffirmed the *Milligan* decision in treating that individual as a criminal. *Id.*

The government fails to meet the standard required for designating Ahmed an "enemy combatant." First, as the *Hamdi* plurality articulated, where the circumstances governing the law of war are not traditional, the AUMF may not authorize detention in the first place. *Hamdi*, 542 U.S. at 521. In *Hamdi*, *Quirin*, and *Milligan*, the individuals were clearly associated with enemy governments against whom the United States had declared war. See *Hamdi*, 542 U.S. at 507; see also *Milligan*, 71 U.S. at 2; see also *Quirin*, 317 U.S. at 1. Therefore, these individuals were actually affiliated with enemy governments rather than with international terrorist organizations.

Ahmed's alleged affiliations do not extend to any particular government against whom the United States has declared war, but rather against a rogue international organization believed to be the source of various acts of terrorism. (R at 7.) The courts have been careful to not strip individuals of constitutional rights based on these specific alleged affiliations but rather only to reserve enemy combatant designations for those associating with actual enemy governments. See *Hamdi*, 542 U.S. 507.

The Court should pay particular attention to the fact that al Qaeda is not the traditional type entity with which the United States usually engages in war. Unlike clearly defined nations run by enemy governments, al Qaeda is much like a loose vagabond association of migrant terrorists permeating virtually every country of the world. As a result, the proliferation of al Qaeda-motivated random acts of terror may result from either centralized planning or spontaneous, unsponsored attacks. Because of this, it is impossible for any country to declare war against al Qaeda in the same way war is traditionally declared against nations.

Further, as in *Milligan*, Ahmed is a civilian, legally residing within the United States, who has not taken up arms against the United States. (R at 7.) Ahmed has not actually engaged in any war making, as required in *Hamdi*, and has not "taken up arms against" the United States, as discussed in *Padilla*. (R at 7.) *Padilla*, 423 F.3d at 390; see *Hamdi*, 542 U.S. at 507.

Rather, Ahmed has been indefinitely detained by the government over alleged affiliations with a non-government organization, clearly depriving him of constitutional rights. (R at 7.) Had Ahmed actually taken up arms against the United States, the government would have a greater argument for designating him an "enemy combatant." But the lack of action

combined with the absence of any relationship with an enemy government makes it virtually impossible for the United States government to align their actions with any case law validating these authorizations.

Ahmed has come to the United States legally, with a valid purpose, from a country with whom the United States is at peace. (R at 7.) This court should be greatly concerned with the precedent which would undoubtedly be set if the government is allowed to deprive someone their reasonably expected constitutional protections based on allegations of terrorist affiliations.

B. The President does not have inherent constitutional authority to indefinitely detain enemy combatants because this would directly contradict congressional intent as expressed in the Patriot Act.

Article II does not grant constitutional authority to the President permitting the indefinite detention of enemy combatants contrary to explicit congressional mandates. See U.S. Const., art. II. The *Youngstown Sheet & Tube Co. v. Sawyer* framework has traditionally informed the courts as to the amount of constitutional authority given to the President to make these types of decisions during wartime. 343 U.S. 579, 635 (1953).

The *Youngstown* concurrence, the prevailing law applied in this area, notes that where the President acts according to Congress's wishes, "his authority is at its maximum." *Id.* at

635. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. However, "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.*

To understand which of the three *Youngstown* situations exists in Ahmed's case, the Court must determine what, if any, instruction was given by Congress on this topic. The AUMF has not given authorization to detain; rather, the Court has found instances where the President may detain and be in line with AUMF purposes for protecting citizens. On the other hand, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), also enacted by Congress, explicitly forbids the President from indefinitely detaining "enemy aliens." Pub. L. No. 107-56, 115 Stat. 272.

The Patriot Act admittedly grants some broad powers to the President to detain aliens who have entered the country set to commit acts of terrorism. *Id.* However, this Act clearly notes that where detention looks to be indefinite in nature, the Attorney General is required to instead begin removal proceedings or "charge the alien with a criminal offense" "not

later than 7 days after the commencement of such detention." *Id.* at §412(a). In short, the Patriot Act concerns the potential detention of aliens with terrorist affiliations and strictly forbids indefinite detention. *Id.*

Ahmed is clearly the intended candidate of the Patriot Act. Ahmed was legally residing within the United States and there was no clear indication he was associated with a firm terrorist plot. (R at 7.) Additionally the nature of Ahmed's detention indicated that it would be indefinite rather than temporary. Wartime detention is traditionally confined to the duration of the war, however, the War on Terror has no definite end in sight due to the nature of the enemy. As the President has chosen to indefinitely detain Ahmed, he is acting directly against the instructions and wishes of Congress and is therefore acting in the lowest ebb of his authority. *Youngstown*, 343 U.S. at 637; (R at 7.)

In light of Ahmed's clear grant of constitutional protections and rights, the President's indefinite detention of Ahmed, contradictory to the will of Congress, appears to display a severe injustice and disregard for Ahmed's rights. It is true that the President must have means of protecting civilians from acts of terror and he must not be overly burdened by unreasonable restraints; however, clear limitations have been placed to protect individual liberties and prevent tyrannical

rampages while keeping important safety considerations a top priority. Indefinitely detaining Ahmed is an unauthorized violation of constitutional rights in addition to being an overly restrictive precaution.

II. THIS COURT MUST CLARIFY THE RULING IN *HAMDI* SO THAT MILITARY DETAINEES - EVEN ENEMY COMBATANTS - ARE NOT UNNECESSARILY DEPRIVED OF DUE PROCESS OF LAW.

Due Process is guaranteed by the Fifth and Fourteenth Amendments as a right of all accused of crimes and has been called a fundamental right by the Court. *Hamdi*, 542 U.S. at 529. Notwithstanding that classification, the Court has consistently approached Due Process as a flexible principle which must expand or narrow when competing interests conflict. *Id.* This ensures that Due Process is neither under nor overprotected. Most recently, the Court discussed the issue in *Hamdi*, a plurality ruling wherein Due Process rights were articulated regarding enemy combatants captured at the site of military operations during a time of active warfare. *See id.* at 507.

The *Hamdi* plurality outlines a constitutional minimum for Due Process and then finds that minimum to be adequate for the enemy combatant involved. *Id.* Nevertheless the rendered opinion specifically discusses Due Process as a balancing of interests as outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), thus creating confusion regarding the standard to be applied in cases dealing with enemy combatants.

The Court should seize this opportunity to clarify that the ruling in *Hamdi* supports, rather than overrules, *Matthews* when it mandates an absolute minimum Due Process. This Court should affirm that while the specific facts of *Hamdi* justified using hearsay evidence, justified a burden-shifting scheme, and required only the bare constitutional minimum for Due Process, this is not a rule to be applied for all enemy combatants. Rather, each court must judiciously weigh the interests involved to determine the appropriate Due Process as mandated by the facts and in light of the Constitution.

A. *Hamdi* outlines the minimum requirements for Due Process but the Court only determines that minimum to be the permissible Due Process after balancing the interests of the government against the rights of the accused in a case-specific analysis.

The plurality in *Hamdi* outlines a constitutional minimum requirement for Due Process; however the facts of each case must be considered before determining whether that constitutional minimum will be sufficient Due Process. *See Hamdi*, 542 U.S. 507. The constitutional minimum is not sufficient Due Process in most cases; therefore a court must necessarily balance competing interests in order to determine what will satisfy Due Process in any specific case.

1. At a minimum, Due Process requires that the accused be notified of the factual basis for his classification as an enemy combatant and receive a fair opportunity to rebut the assertions in front of a neutral decision maker.

Long before the United States entered the War on Terror and long before the government coined the term "enemy combatant", the Court held that every accused has the right to: 1) receive "notice of the factual basis for his classification", 2) have a "fair opportunity to rebut the government's factual assertion", and 3) present his case before a neutral decision maker. See *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). Twenty years later, the Court ruled in *Hamdi* that the *Cleveland Bd. of Ed.* standard represented the constitutional minimum granted even to those who waged war against the United States. *Hamdi*, 542 U.S. at 531.

First, the government will typically provide notice for the factual basis for enemy combatant classification by presenting substantial evidence which justifies the detention. *Id.* The presentation of merely "some evidence" is insufficient because it allows for some of "the Executive's factual assertions [to] go wholly unchallenged". *Id.* at 535. The Court does not further clarify the nature of the evidence to be presented but guides lower courts, advising them to "proceed with [] caution" and "engag[e] in a factfinding process that is both prudent and incremental". *Id.* at 537.

Second, minimum Due Process guarantees a detainee the opportunity to rebut the factual assertions made by the

government. As suggested previously, even minimum Due Process prevents government assertions from being presumed truthful without the review of any opposing party. *Id.* at 535-36. "An unchecked system of detention carries the potential to become a means for oppression and abuse of others." *Id.* at 528. Moreover, the fundamental right to be "free from involuntary confinement" requires that a detainee be given the chance to argue against evidence submitted to a habeas court or to produce counter-evidence. *Id.* at 529.

Third, the rebuttal of evidence must be presented before a neutral decision maker. *Id.* at 531. While the Court did not foreclose the possibility that a military tribunal *could* theoretically act as a neutral decision maker for purposes of an evidentiary rebuttal, the Court indicated that any person with the remotest interest in the outcome could not adequately act as a neutral decision maker. *Id.* at 536. This forecloses the use of interrogations as an opportunity to rebut evidence justifying detention because interrogators have both an interest and an invested relationship with the accused. *Id.*

2. This Court should clarify that the Due Process minimum outlined in *Hamdi* does not overrule previous holdings that Due Process determinations must account for the conflicting interests in light of the particular facts of the case at hand.

While each individual designated as an enemy combatant is guaranteed the constitutional minimum for Due Process as held in

Hamdi, the Court has stated many times that Due Process determinations are case-specific findings. *Id.* at 526-28. Therefore, it would be improper to determine that all enemy combatants have the same Due Process rights. Ahmed's capture and designation as an enemy combatant differs so drastically from that of Hamdi's that it would be improper to use the same standard for both. Ahmed's situation mandates a heightened level of Due Process, which process he was denied.

To begin, Due Process guarantees the right to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). What constitutes meaningful will necessarily vary depending upon time, circumstances, and the facts of the case. *Id.* Moreover, "Due Process is not a technical conception with a fixed content unrelated to time, place and circumstances," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); rather it is "flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The Court applied these principles when holding that a determination of Due Process will necessarily require the court to balance the accused's liberty interest against the government's interest in protecting the military from disruption. *Hamdi*, 542 U.S. at 528-30. The government's interests may include factors such as preventing enemy

combatants from returning to battle against the United States, protecting military secrets, or preserving the man-power of military officials from being focused away from war efforts and in pursuit of judicial proceedings. *Id.* at 529. Nevertheless, these are interests which must be appropriately considered but not assumed as true in all cases dealing with enemy combatants.

Because the facts surrounding Ahmed's detention do not invoke the weight of these factors, it would be inappropriate to apply the same minimum Due Process standard to Ahmed as was applied in *Hamdi*. While the Court in *Hamdi* was dealing with an enemy combatant captured as he held arms against the United States, Burhan Ahmed was detained at his home in East Dakota by civil officers. (R at 7.) Additionally, much of the evidence regarding his detention does not pertain to active military operations at the battlefield. (R at 47-48.) The evidence presented against Ahmed in no way pertains to current military operations. Ahmed has never held arms against the United States nor has he made war against the United States. (R at 7.)

Mere classification as an enemy combatant should not immediately condemn a detainee to the constitutional minimum for Due Process. Such classifications can be made, as in this instance, by the Executive, without justification and without any guarantee that the classification was made by a neutral decision maker. To decrease such a fundamental right without

balancing the appropriate factors would inherently contradict the process required once a detainee actually files suit with the judiciary.

Rather, this Court should find that each detainee, whether or not designated an enemy combatant, receives the same balancing test wherein relevant interests are weighed to determine case-specific Due Process. While Ahmed's alleged affiliation with al Qaeda would certainly decrease his Due Process rights, the facts of the case do not support a determination that he qualifies only for the minimum Due Process outlined in *Hamdi*.

B. Even if this Court decides to permit the minimum Due Process for any individual designated an enemy combatant, Ahmed was still denied Due Process of law.

In the instance that this Court holds that Ahmed, and therefore all enemy combatants, should receive only the constitutional minimum for Due Process, Ahmed was still denied Due Process because he did not receive adequate notice for the factual basis of his classification. Moreover, Ahmed did not receive a sufficient opportunity to rebut the facts given him.

1. The only factual basis provided Ahmed was hearsay evidence, which evidence is only appropriate in cases where investigatory measures would interfere with national security and military operations; neither of those interests factor strongly in this case.

Where the task of compiling non-hearsay evidence would be unduly burdensome on the government during military operations,

"a habeas court in a case such as this may accept affidavit evidence." *Hamdi*, 542 U.S. at 537. The Court used this standard in determining that the Mobbs Declaration, a third party summary of evidence against Hamdi, could be used as the factual basis for detention. *Id.* However, the Court in no way indicated that hearsay declarations of that nature may *always* nor *often* be used in lieu of traditional evidence required for such a detention.

The Court stated, "We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental." *Id.* Here, the Court is - yet again - charging lower courts with the task of balancing interests and determining the appropriate standard by which a detainee may be justly detained without compromising military operations.

Moreover, *Hamdi* is the first case where hearsay evidence has been permitted as the sole factual basis upon which a detainee is confined to detention. *Hamdi*, 542 U.S. at 525-26. Because this approach is new and has not been endorsed by the full or even majority of the Court, it should be applied narrowly and with caution.

Hamdi was a U.S. citizen who had joined with the Taliban in Afghanistan and had taken up arms against the United States. *Id.* at 508. After being captured by the Northern Alliance, he was

turned over to the United States military and was designated an "enemy combatant". *Id.* Hamdi was captured during active warfare and was armed against the United States at the battle's front. *Id.* The government argued that presenting the actual evidence supporting Hamdi's detention would both detract from the focus of military personnel currently engaged in making war and would compromise military endeavors by revealing state secrets. *Id.* at 510-11.

Conversely, Ahmed's capture happened in the United States and the information contained in the Murphy Declaration deals with facts that do not pertain to military activities occurring at the battlefield. (R at 47-48.) The evidence could likely be acquired without causing any disruption to war making endeavors nor would such a task require the attention of military officials who should be focused elsewhere. Instead, the Murphy Declaration asserts that Ahmed personally met with Osama Bin Laden, that he received funding from a financial facilitator of the 9/11 attacks, and that he has engaged in social security fraud and computer network hacking. (R at 47-48.) It would not burden the government to provide evidence of these facts any more than it would burden the government to provide evidence for any other criminal case.

If this Court determines hearsay evidence to be wholly applicable to any case involving an enemy combatant, the Court

would be granting the Executive the power to single-handedly deny an individual the rights protected by evidentiary rules merely by designating the person as an "enemy combatant". As this determination procedure rests entirely within the discretion of the Executive, such a move would effectively give the Executive undue control over issues which are not within the scope nor skill of the Executive.

Because the government has insufficient interest in using hearsay evidence in lieu of traditional evidence as required by federal law, the Murphy Declaration should not be admitted as the factual basis for Ahmed's detention. Using this type of hearsay evidence when the situation does not require it prevents a detainee from receiving adequate notice of the factual basis for their detention.

2. Burden-shifting schemes are a substantial shift from the traditional burden of proof standard and using such a scheme when the situation does not require it would effectively deny a detainee a fair opportunity for rebuttal of evidence.

Much like the analysis and rationale indicating that hearsay evidence only be admitted when circumstances mandate, burden-shifting schemes create the potential for abuse of the judicial system from other branches of the government. A burden-shifting scheme is one in which the presumption of truth goes in favor of the government's evidence rather than the presumption of truth going in favor of the detainee. *Hamdi*, 542 U.S. at 532.

Granted, even such a burden shifting scheme is rebuttable; nevertheless, this type of shift raises the bar with which the detainee is measured. The detainee loses the presumption of innocence and must *prove* his innocence rather than the *government* being forced to prove his guilt.

While "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and a fair opportunity for rebuttal were provided," the Court never suggests that this measure is appropriate merely because the detainee is an enemy combatant. *Id.* Although it is sufficient to meet a constitutionally minimal standard, it may not be sufficient in all cases.

This Court should, again, clarify that such burden-shifting schemes may be implemented where the facts of the case require it. Nevertheless, such a scheme is not required here, nor is it appropriate, in light of the facts of Ahmed's detention. The government has not asserted any interest substantial enough to justify such a grand departure from settled criminal law and the implementation of such a scheme in Ahmed's case would amount to an effective denial of the fair opportunity to rebut the factual basis for his detention.

Ahmed did not receive a fair opportunity to rebut the factual basis for his detention because he was forced to prove

his innocence where the Constitution would typically have the government prove his guilt. While changing the standard in some cases would not offend the Constitution, such a move in this instance is certainly not justified.

Rather than allowing Ahmed to retain the presumption of innocence, the District Court relied upon the Executive's determination of Ahmed as an "enemy combatant" to justify the burden-shift. This reliance upon an Executive determination is both unwarranted and unconstitutional. The judiciary is charged with making such determinations and the Executive has never been considered a neutral decision maker for purposes of decreasing someone's rights. Because the facts surrounding Ahmed's detention do not warrant the burden-shift applied at the District Court, Ahmed did not receive a fair opportunity to rebut the factual basis for his detention, thus depriving him of Due Process.

CONCLUSION

For the forgoing reasons this Court should reverse the decision of the courts below.

Respectfully Submitted,

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