

Docket No. 08-11144

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 Petitioners

Of Counsel

Team Number: 8761

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 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?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the
Twelfth Circuit is unreported (Docket No. 06-9701, November 24,
2008). The opinion of the United States District Court for the
District of East Dakota is unreported.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 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 offense 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."

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

3. Section 9, Clause 2 of Article I provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended,

unless when in Cases of Rebellion or Invasion the public Safety may require it."

4. 18 U.S.C. § 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

5. 28 U.S.C. § 2241 extends the writ of habeas corpus to prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States."

6. 28 U.S.C. § 2243 authorizes habeas corpus petitioners to "deny any of the facts set forth in the return or allege any other material facts," and provides that courts "shall summarily hear and determine the facts."

7. Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, provides: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

8. 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 (Oct. 26, 2001) (Patriot Act).

STATEMENT OF THE CASE

In this case the President seeks to order the indefinite military detention of an individual lawfully residing within the United States without the protections of the civilian criminal justice system. The Petitioner was arrested by federal agents and remained in custody for over eighteen months before being designated an "enemy combatant" by the President and transferred to military custody. The Petitioner has been in custody for over eight years without charge, trial, or sufficient opportunity to challenge his designation as an "enemy combatant." Petitioner does not meet the established definition of "enemy combatant" and has not been afforded the due process protections he is guaranteed. In this case the government wishes to both expand the definition of "enemy combatant" and restrict the process afforded to those so labeled. These new Presidential powers would raise serious constitutional issues for the citizens of the United States and the government's arguments should be rejected.

A. Factual Background

Burhan Uddin Ahmed is a citizen of Pakistan. (R. 7). On September 8, 2001 he lawfully entered the United States with his family to pursue a doctor of veterinary medicine degree at Wilson University in Wilson, East Dakota. Id. On January 3, 2002 he was arrested by federal agents as a material witness in the September 11th attacks and was detained in Wilson. Id. Although he was originally to face charges in civilian court, he was transferred to military custody after the President signed an order designating Ahmed as an "enemy combatant" on June 13, 2003. Id. Since that time Ahmed has been held by the military at the Army Regional Consolidated Detention Facility in Souds, East Dakota without charge or trial. Id. at 8. Ahmed filed a petition for a writ of habeas corpus in the District of East Dakota seeking his release on the basis that his designation as an "enemy combatant" was unlawful. Id. The government opposed this petition asserting that the President has the power to indefinitely detain Ahmed. Id. The entire basis for Ahmed's designation as an enemy combatant is found in the form of a hearsay document, Declaration of John R. Murphy (Murphy declaration). Mr. Murphy, the Director of the Joint Intelligence Task Force for Combating Terrorism declares that Ahmed "attended an al Qaeda-run terrorist training camp in

Afghanistan for 18 months between 1996 and 1998 . . . was trained in the use of poisons . . . cultivated relationships with . . . Osama Bin Laden and Khalid Sheikh Muhammad . . . was in failing status at the university . . . was commissioned by al Qaeda to enter the United States as a sleeper agent . . . volunteered to be [a] martyr . . . received substantial funding . . . acted as a contact point for al Qaeda operatives newly arriving in the United States, [and] was instructed to investigate the plausibility of hacking into . . . the Social Security Administration with the objective of creating chaos . . . and securing revenue." (Murphy declaration 1). An analysis of Ahmed's computer showed "research regarding use of chemicals as weapons . . . computer programs typically utilized by hackers, [and] lectures by Bin Laden." Id. at 2. Additionally the government alleges Ahmed had been in telephone communication with an al Qaeda officer and was in possession of approximately forty Social Security numbers. Id.

It is important to note what the declaration does not allege. The government does not claim that Ahmed is a member of al Qaeda. Ahmed is not alleged to ever have taken up arms against the United States on behalf of any group or organization. It is not alleged that Ahmed was planning an attack against the United

States. It is not alleged that Ahmed ever committed or was planning to commit a belligerent act against the United States.

B. Proceedings Below

The district court found that Ahmed could be detained as an enemy combatant but that he was entitled to challenge the basis of detention at a hearing conforming with his due process rights, and sent the case to a magistrate judge to determine the process he must be afforded. (R. 9). The Magistrate judge determined that Ahmed must be provided notice of the factual basis for his detention, and if credible evidence was produced supporting his designation as an enemy combatant then the burden would shift to Ahmed to refute this designation with more persuasive evidence. Id. The magistrate judge concluded the Murphy declaration provided Ahmed with notice of the factual basis for detention and was sufficient evidence to show he was an enemy combatant, shifting the burden to Ahmed to prove otherwise, and allowed him sixty days to do so. Id. Ahmed refused to provide any evidence and instead issued a general denial, asserted he was not an enemy combatant, and insisted the adopted procedures were unconstitutional. Id. The magistrate judge recommended Ahmed's petition for a writ of habeas corpus be dismissed based on his refusal to present evidence on his behalf

and the district court agreed. Id. at 10. Ahmed appealed the decision and a panel for the U.S. Court of Appeals for the Twelfth Circuit affirmed. Id. After granting a motion for rehearing, the Twelfth Circuit sitting en banc, reversed and remanded, holding that the AUMF empowered the President to detain Ahmed as an enemy combatant because he "had a clear association with and allegiance to al Qaeda's mission and was taking steps to support it" but that Ahmed was not afforded sufficient process to challenge his designation as an enemy combatant because the government has not produced evidence that the Murphy Declaration is the most reliable available evidence and is required to do so. Id. at 19, 27.

Ahmed filed a Petition for a Writ of Certiorari and this Court accepted for review the two questions presented in Ahmed's petition.

SUMMARY OF ARGUMENT

The President does not have the authority to indefinitely detain Burhan Uddin Ahmed. Ahmed entered the United States legally and is entitled to all the protections of the Due Process Clause.

United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

The general rule for both citizens and legal aliens is that the government may not "detain a person prior to a judgment of guilt

in a criminal trial." United States v. Salerno, 481 U.S. 739, 749 (1987). Ahmed must fall within one of the carefully limited exceptions to this rule for the President to indefinitely detain him. The exception the government wants to place him in is for those people labeled enemy combatants. The government has not made any allegations that would place Ahmed in the category of enemy combatant. He is not alleged to be a member of any military or terrorist organization. It is not alleged that he ever took up arms or fought against the United States. The government does not allege Ahmed ever engaged in, or planned to engage in, any belligerent act against the United States. These are the very minimum requirements courts have recognized for classifying a person as an enemy combatant and the allegations against Ahmed do not meet any of them.

The President does not have any inherent constitutional power to detain Ahmed if he does not meet the definition of enemy combatant. Congress expressed their authorization for how the President may handle "alien terrorists" living in this country and indefinite detention is not authorized. The President has no power to act in opposition of this will. Ahmed does not meet the definition of enemy combatant, the President has no other authority to detain him, and therefore he should be released from military custody.

Ahmed was not afforded sufficient due process in his habeas proceeding before the district court because the court misapplied the decision in Hamdi v. Rumsfeld, 542 U.S. 507 (2004) and accepted the hearsay Murphy declaration. The district court rigidly applied Hamdi, not taking into account the different circumstances of Ahmed's case, namely that he was arrested at his home inside the United States and not on an enemy battlefield. The practical difficulties and burdens on the government contemplated in Hamdi as permitting a tailoring of due process in habeas proceedings involving enemy combatants do not exist in Ahmed's case and the court failed to take this into consideration. The district court also should not have accepted the government's hearsay Murphy declaration without first inquiring of the government if they could provide anything more reliable. The process afforded Ahmed should not have been reduced based on the circumstances of his case, and therefore the evidentiary standards also should not have been reduced without the government showing why it was necessary. Additionally, the court should not have dismissed Ahmed's writ based on his failure to refute the government's evidence against him based on his belief that he was not being afforded process which comports with the constitution. He was entitled to challenge that process before the court dismissed his writ.

ARGUMENT

I. THE PRESIDENT HAS NO LEGAL AUTHORITY TO INDEFINITELY DETAIN

AHMED

The government has conceded that the AUMF only authorizes the detention of "enemy combatants."¹ (R. 29 n.1). Ahmed entered the United States legally and is not alleged to be a member of any nation's military or part of any terrorist organization.² (R. 7). The government does not allege that Ahmed fought alongside any nation's armed forces, took up arms against the United States, committed a belligerent act, or participated (or planned to participate) in hostilities. (Murphy Declaration 1-2). The government wishes to label Ahmed as an enemy combatant and detain him indefinitely but has failed to provide any legal justification for doing so. See Hamlily v. Obama, 616 F.Supp.2d

¹ See Gherebi v. Obama, 609 F.Supp.2d 43 (D.D.C. 2009) (concluding term "combatant" does not apply to non-international conflicts). Although the term "combatant" and therefore the term "enemy combatant" has been found not to apply to the conflict between the United States and al Qaeda it will be used here because (1) this Court has yet to declare the term inapplicable and (2) the government is alleging Ahmed is an "enemy combatant." Id. at 57-60. Petitioner acknowledges the AUMF authorizes the detention of persons engaged in non-international conflicts and therefore the term "enemy combatant" will be used to describe all persons the president has the authority to detain indefinitely whether they are engaged in an international or non-international conflict. Id.

² The government alleges that Ahmed has connections and affiliations with al Qaeda but not that he is actually a sworn member of that organization. (Murphy Declaration 1-2).

63 (D.D.C. 2009) (detailing scope of detention authority under AUMF); see also Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

A. AHMED HAS THE SAME PROTECTIONS UNDER THE DUE PROCESS CLAUSE
AS ANY UNITED STATES CITIZEN

The Constitution guarantees that no person shall "be deprived of life, liberty, or property, without due process of law". U.S. Const. amend. V. Aliens are entitled to the rights guaranteed by the Due Process Clause "when they have come within the territory of the United States and developed substantial connections with this country." Verdugo-Urquidez, 494 U.S. 259, 271 (1990); see also Boumediene v. Bush, 128 S.Ct. 2229, 2246 (2008) (noting Fifth Amendment protects foreign nationals); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (observing foreign nationals enjoy Due Process Clause protections); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (stating that "once an alien lawfully enters and resides in this country he becomes . . . protected by . . . the Fifth Amendment"); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that "all persons within the territory of the United States are entitled to the protection guaranteed by" the Due Process Clause).

Ahmed entered the United States legally and lived here for months with his family before being arrested and is therefore entitled to the protections of the Fifth Amendment. (R. 7). Under the Due Process Clause the general rule is that "the government may not detain a person prior to a judgment of guilt in a criminal trial." Salerno, 481 U.S. 739, 749(1987). The Court has recognized a limited number of exceptions to this general rule. See, e.g. Kansas v. Hendricks, 521 U.S. 346 (1997) (finding exception for civil commitment of mentally ill sex offenders); Schall v. Martin, 467 U.S. 253 (1984) (finding exception for pretrial detention of dangerous juveniles); Addington v. Texas, 441 U.S. 418 (1979) (finding exception for civil commitment of mentally ill). The Court has also recognized that Congress may authorize the President to detain persons who "qualify" under the "legal category" as "enemy combatants." Hamdi, 542 U.S. at 516, 522. The government seeks detention under this last exception and recognizes Ahmed must be an "enemy combatant" to do so under the AUMF. (R. 29).

B. CLASSIFYING AHMED AS AN ENEMY COMBATANT IS CONTRARY TO LEGAL PRECEDENT

In Hamdi, an American citizen was captured while engaging in battle against American forces in Afghanistan as part of the Taliban. See 542 U.S. at 518-22. Hamdi was alleged to have (1)

affiliated with a Taliban military unit, (2) taken up arms with the Taliban, and (3) engaged in armed conflict against the United States. Id. at 510, 513, 516. Hamdi's detention was upheld because he took up arms with the army of an enemy nation and therefore under the law of war, was an "enemy combatant." Id. at 518-20. The Court held "the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe," that is individuals who were "part of or supporting forces hostile to the United States...and who engaged in an armed conflict against the United States." Id. at 516-517.

Similarly in Padilla, an American citizen who "was armed and present in a combat zone" as part of the Taliban forces in Afghanistan during the conflict with the United States was arrested and the government sought to classify him as an enemy combatant. 423 F.3d 386, 390-91 (4th Cir. 2005). The Fourth Circuit held that Padilla qualified as an enemy combatant reasoning that he "took up arms against the United States...in the same way and to the same extent as did Hamdi" even though Padilla was arrested at the United States border and not on the battlefield. Id. at 391. The court noted that Padilla's detention, like Hamdi's was permissible "to prevent a combatant's

return to the battlefield...a fundamental incident of waging war." Id.

In Ex Parte Quirin, men paid by the German military to bring explosives into the United States were found by the Court to be enemy combatants because anyone "who associates themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of...the law of war." 317 U.S. 1, 37-38 (1942).

In Hamliily, the U.S. District Court for the District of Columbia, recognized that the holdings of Hamdi, Padilla, and Quirin, logically needed to be recognized to include the authorized detention of individuals who are part of (members of) the forces of organizations targeted by the AUMF and not just the military arm of a government. 616 F.Supp.2d at 69-70.³ Additionally the court in Hamliily stated the detention authority

³See ICTY Trial Chamber, Prosecutor v. Gali a, Case No. IT-98-29-T, ¶ 47 (Dec. 5, 2003) (outlining significance of membership status). The membership status as a basis for detention is crucial because "membership in an armed group makes one liable to attack and incapacitation independent of direct participation in hostilities." Id. at 74. See also International Committee of the Red Cross, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War at 1453 (1960) (concluding members "may be attacked . . . at any time").

covers "any person who has directly participated in hostilities," [or] "committed a belligerent act." 616 F.Supp.2d at 70, 77.

In Ex Parte Milligan, an Indiana resident during the Civil War was alleged to have communicated with the enemy and conspired to "seize munitions of war . . . [and] join[ed] and aid[ed] . . . a secret [enemy organization] for the purpose of overthrowing the Government." 71 U.S. 2, 6 (1866). The Court held that Milligan was a civilian and was not subject to military control. Id. at 130. The Court reasoned that even though Milligan had committed "an enormous crime" during "a period of war" there was no support in the laws of war to treat him as a combatant because he had not taken up arms against the United States or joined the military of a foreign government. Id. at 121-122, 130.

Ahmed is not alleged to have committed any acts which would strip him of his civilian status, take away his rights to Due Process and allow him to be labeled an "enemy combatant." When taken together, the rulings in Hamdi, Padilla, and Quirin establish that a United States civilian can be designated as an enemy combatant if he is a member of the military of an enemy nation or if he has taken up arms against the United States on behalf of an enemy of the United States.

It is logical and within the law to adopt the district court's ruling in Hamlily and find authorization for the detention of anyone who is a member of a targeted organization such as al Qaeda or has taken up arms on behalf of that organization or has directly participated in hostilities against the United States. It is also logical to further say the government does not have to wait until the belligerent act has been committed but can detain someone who was planning to directly take part in such an attack.

Ahmed does not fall into any of these categories. He is not alleged to be part of or a member of al Qaeda. He is not alleged to have taken up arms or fought against the United States the way Hamdi and Padilla were alleged to have done on behalf of the Taliban. It is not alleged that Ahmed was planning a hostile attack on the United States like the men in Quirin.

The allegations against Ahmed more closely resemble those against Milligan. He is alleged to have some relationship and communication with al Qaeda and was "commissioned" to be a "sleeper agent" and "investigate the plausibility of hacking into . . . the Social Security Administration." These allegations do not rise to the level of having directly participated in, or

even planning to directly participate in, hostilities and belligerent acts against the United States and therefore Ahmed cannot legally be classified as an enemy combatant. A ruling to the contrary would allow for the possibility that United States citizens could be indefinitely detained, attacked, or even shot, on the basis of an allegation, supported entirely by hearsay, that they had associations with enemy organizations.

C. THE PRESIDENT HAS NO INHERENT CONSTITUTIONAL POWER TO DETAIN

AHMED

The government erroneously contends that regardless of whether the AUMF authorizes detention that the President has the inherent constitutional power to do so. Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer provides the guidelines when evaluating Presidential power. 343 U.S. 579 (1952). "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 possess in his own right plus all that Congress can delegate." Id. at 635 (Jackson, J. concurring). "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers." Id. at 637. "When the

President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” Id.

1. THE PRESIDENT IS ACTING AGAINST THE EXPRESS WILL OF CONGRESS

The AUMF does not provide congressional authorization to detain Ahmed.⁴ Congress’ will regarding the Presidential power to detain “enemy aliens” is expressed in the Patriot Act. 115 Stat. 272. The Patriot Act Authorizes the Attorney General to detain any alien whom he has “reasonable grounds to believe” has entered the United States seeking to engage in espionage, sabotage, a terrorist activity, or is a representative of any terrorist organization. Id. These are undeniably similar to the allegations against Ahmed. (Murphy Declaration 1-2). The Patriot Act expressly forbids the indefinite detention of such persons and requires removal proceedings or charges be brought within seven days.⁵ 115 Stat. 272.

⁴ See Supra Part I (B) (detailing scope of detention authorization).

⁵ See Ahmed v. U.S., Docket No. 06-9701 (November 24, 2008) (dismissing relevance of Patriot Act). The plurality of the lower court dismisses the argument that the more specific Patriot Act governs the general AUMF by concluding in a footnote that the “two provisions deal with different powers of the President” , namely the take care clause and the commander-in-chief power. Id. at 17-18 n.2. This argument is misplaced because the take care clause is a duty, not a power, and Congress was not intending to authorize the President to act in a way he already had an obligation to act. U.S. Const. Art. II § 3. Additionally the commander-in-chief power does not by itself grant the President military authority to detain citizens. United States ex re. Toth v. Quarles, 350 U.S. 11, 14 (1955).

2. THE PRESIDENT'S INDEPENDENT CONSTITUTIONAL POWER TO DETAIN
AHMED IS AT ITS WEAKEST

When the President is acting against the express wishes of Congress his power is at its lowest and "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." Youngstown, 343 U.S. at 638 (Jackson, J. concurring). This Court recently emphasized that "[w]hether or not the President has independent power . . . he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006) (citing Youngstown, 343 U.S. at 637 (Jackson, J. concurring)). Without clear and unmistakable statutory authorization, no authority to indefinitely detain citizens may be implied. Ex parte Endo, 323 U.S. 283, 300 (1944).

Absent a suspension of the writ of habeas corpus the President does not have independent constitutional power to subject civilians within the United States to indefinite detention without criminal trial. See United States ex re. Toth v. Quarles, 350 U.S. 11, 14 (1955) (finding military authority over civilians cannot rest on President's power as commander-in-chief). As discussed above the President has congressionally

authorized power to detain enemy combatants under the AUMF but the allegations against Ahmed do not allow for that designation and the President cannot act against the express wishes of Congress because he has no independent authority to do so and therefore Ahmed should be released from military custody.

II. AHMED WAS NOT AFFORDED SUFFICIENT DUE PROCESS IN HIS HABEAS
PROCEEDING BEFORE THE DISTRICT COURT

The Court should affirm the decision of the Twelfth Circuit that the district court erred by strictly applying the Hamdi burden-shifting analysis to the different circumstances of Ahmed's case (specifically, that Ahmed was arrested at his home inside the United States, not seized on a battlefield in Afghanistan), and by accepting the hearsay Murphy Declaration "as the most reliable available evidence" without first determining whether the government could provide more reliable evidence.

This Court, in Hamdi, considered the question of "what process is constitutionally due to a person who disputes his enemy combatant status." Hamdi, 542 U.S. 507. Hamdi, an American citizen, was captured on the battlefield in Afghanistan and transferred directly into military custody in the United States, where the President designated him an enemy combatant and ordered his detention. Id. A habeas petition was subsequently

filed on his behalf, challenging his designation as an enemy combatant. Id. Thereafter, the government offered a hearsay document (Mobbs declaration) summarizing the factual basis for Hamdi's designation as an enemy combatant. Id. This Court recognized that the normal habeas proceedings (and their component processes) outlined in 28 U.S.C. §2241 and its companion provisions may need to be compromised in light of the realities of the military context in which enemy combatant cases arise.⁶ Id. The Court held that a detainee challenging his enemy combatant status, "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." Id. at 533. The Court further held that a relaxed evidentiary standard may be appropriate in the context of a habeas proceeding of an enemy combatant and, "hearsay . . . may need to be accepted as the most reliable available evidence from the government . . . likewise, 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

⁶ The Court recognized that the government has an interest in "detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict," as well as an interest in "ensuring that those who in fact fought with the enemy during a war do not return to do battle against the United States." Id. at 530-531.

opportunity for rebuttal were provided." Id. at 533-534. The Court then laid out a burden-shifting scheme under which the government must first provide "credible evidence that Hamdi meets the enemy-combatant criteria" after which "the onus could shift to Hamdi to rebut that evidence with more persuasive evidence that he falls outside the criteria." Id. The Court suggested that there were practical obstacles which may be unduly burdensome to the government to overcome, in order to provide the procedural safeguards normally afforded a habeas petition because Hamdi was captured on a foreign battlefield.⁷ Id. The Court reasoned that this scheme would address "the risk of an erroneous deprivation" of the detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the government." Id. at 534 (quoting Mathews, 424 U.S. at 335.).⁸

The Fourth Circuit weighed in and expanded on the process due enemy combatants in al-Marri v. Pucciarelli, 554 F.3d at 255 (4th

⁷ The Court gave weight to the government's argument that, "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war." Hamdi, at 531.

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Cir. 2008). The facts of that case are strikingly similar to those of the instant case. Al-Marri, a citizen of Qatar, immigrated to the United States, ostensibly for the purpose of attending Bradley University in Peoria, Illinois. Id. at 255. Two months after his arrival, he was arrested by FBI agents as a material witness in the investigation of the 9/11 attacks. Id. He was subsequently charged in civilian court but before his trial, the President declared him an enemy combatant and ordered the military to detain him. Al-Marri filed a habeas petition, to which the government responded with a hearsay document, the Rapp declaration, providing a summary of the factual basis for his detention. Id. The court determined that under the Hamdi standard, the government had met its initial burden of producing credible evidence (Rapp declaration) after which the government gave al-Marri sixty days to respond with more persuasive evidence and al-Marri refused to offer any rebuttal evidence beyond a general denial, claiming that the process afforded him was unconstitutional. The court then terminated the inquiry and dismissed the writ. Id. Al-Marri appealed the decision and the Fourth Circuit, sitting en banc, after a panel of judges had affirmed the lower court's decision, reversed and remanded the case. Id. On the issue of the process due al-Marri, the court held that the "general rule . . . is that al-Marri would be

entitled to normal due process protections available to all within this country . . . but if the government can demonstrate . . . that this is impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens on the government to produce non-hearsay evidence . . . then alternatives should be considered and employed." Id. at 273. The court further held that in applying the Hamdi burden-shifting scheme, the government must show in its initial step of producing "credible evidence" why it cannot or should not be required to produce non-hearsay evidence before the burden shifted to al-Marri to rebut that evidence with "more persuasive" evidence. Id., Hamdi, 124 S. Ct. 507. The Court further reasoned that al-Marri's place of capture at his home in the United States may alleviate the practical burdens on the government inherent in producing evidence obtained on the battlefield as discussed in Hamdi. Id.; Hamdi, 124 S. Ct. 507.

The court also opined that al-Marri's refusal to offer rebuttal evidence beyond his general denial based upon his belief that the process being afforded him was unconstitutional was not to be overly criticized given the relevance of the context of executive detention. al-Marri, 534 F.3d at 274. The court

suggested that al-Marri could reasonably fear that if he produced rebuttal evidence on his behalf to meet the "more persuasive" standard, the government could then choose to transfer him to civilian custody and use his own evidence against him there. Id. The court therefore concluded that al-Marri's petition could not be dismissed based on his failure to rebut the government's evidence with more persuasive evidence before his appeal on whether the process being afforded to him comported with the Constitutional requirements of procedural due process. Id.

A. THE DISTRICT COURT IMPROPERLY APPLIED THE HAMDI BURDEN-SHIFTING ANALYSIS TO THE DIFFERENT CIRCUMSTANCES OF AHMED'S CASE.

Ahmed's case is distinguishable from Hamdi because Ahmed was arrested in his home in the United States while Hamdi was captured on the battlefield. Id. The court in Hamdi, in formulating its new minimum process burden-shifting scheme, recognized the practical difficulties and burdens faced by the government in producing evidence obtained on the battlefield and formulated a scheme to address the new realities of habeas proceedings involving enemy combatants. Id. The difficulties contemplated by the Hamdi court are largely not found in Ahmed's

case. Id. Ahmed was arrested, unarmed, at his home in East Dakota by civilian officers as opposed to Hamdi who was captured by the military, rifle in hand, on the battlefield in Afghanistan. It is likely that the evidence against Ahmed was compiled here in the United States by civilian officers located here as opposed to the potential witnesses and information in Hamdi who could possibly still be at war half-way across the globe. Id. The information and those who compiled it, as well as potential witnesses, are more likely to be readily available to testify with less inconvenience and less of a burden to the government in Ahmed's case. Furthermore, the risk of erroneous deprivation of Ahmed's liberty interest is increased in his circumstances as there is a much greater risk in misidentifying a civilian as an enemy combatant because he was not wearing military garb, was not armed, and was arrested at his home, with his family and was not engaged in conducting war on the battlefield in an enemy country as was the case with Hamdi. Id. Therefore, the exigencies and potential burdens which existed in Hamdi, necessitating tailoring (reducing) the process due to the enemy combat in a habeas proceeding, do not exist in this case. Id.

B. THE GOVERNMENT MUST SHOW WHY IT CANNOT PRODUCE MORE RELIABLE
EVIDENCE BEFORE THE COURT ACCEPTS THE HEARSAY MURPHY
DECLARATION.

The district court misapplied the Hamdi court's stance that hearsay *may* provide the most reliable evidence and *may* therefore be sufficient to shift the burden to Ahmed to produce more persuasive evidence to the contrary. Id. (emphasis added). The Court reasoned that the "exigencies of the circumstances may demand that . . . enemy combatant proceedings may be tailored to alleviate their uncommon potential burden to the Executive at a time of on-going military conflict." Id. at 533. Implicit in this reasoning is the core concept that anyone detained in the United States by the government is entitled to challenge his detention in an Article III court as legislated by Congress. 28 U.S.C. §2241. The Hamdi court recognized that the process due in habeas proceedings involving enemy combatants could be tailored, limited, or reduced if certain circumstances existed but that the burden was on the government to show that such circumstances existed. Id. The government did not show why the exigencies or circumstances of Ahmed's case posed an uncommon burden to the executive which necessitated a relaxed evidentiary standard. Id. In weighing Ahmed's liberty interests against

those of the government, it would be unjust to reduce his constitutionally protected rights to process without the government showing why it was necessary to do so. And in Ahmed's case, as has been argued, the exigencies and circumstances recognized by the Hamdi Court are not present. Id. The government, in the initial step of the Hamdi framework, should be required to show why it should not or cannot provide more reliable evidence than hearsay before the burden shifts to Ahmed.

Ahmed's case is very similar to that of al-Marri where the court held that, due to its comparatively distinct facts from Hamdi, the government must show why it cannot produce more reliable evidence before the court accepts it as the most reliable evidence and shifts the burden back to Ahmed to produce more persuasive evidence to rebut the evidence produced by the government. al-Marri, 534 F.3d 213 (4th Cir. 2008). Ahmed in this case should be afforded the same treatment, that the court should not have unquestioningly accepted the Murphy declaration, (particularly in light of the forgoing discussion of the Hamdi court's reasoning behind allowing for a more relaxed evidentiary standard) and that the burden should not have shifted to Ahmed without a preliminary inquiry into the government's reasons and

justifications for not being able to produce more reliable evidence. Id., Hamdi, 124 U.S. 507.

Also in lock-step with al-Marri, and a key feature of the dissent's argument, is Ahmed's refusal to offer more persuasive evidence to rebut the evidence offered by the government. al-Marri, 534 F.3d 213. The dissent argues that the district court adhered to and properly applied the Hamdi framework, that the government provided Ahmed with notice of the basis for his detention with credible evidence (Murphy declaration), and the burden then shifted to Ahmed to produce more persuasive evidence to rebut the evidence of the government. When Ahmed failed to do so, the dissent argues, the inquiry then ended and his writ should therefore be dismissed. As in al-Marri, Ahmed's writ should not be dismissed because the basis for his refusal to offer evidence was his belief that the process being afforded to him was unconstitutional, a belief with which the 12th circuit agreed. Id. Ahmed, having been initially arrested and detained in the civilian courts, had the reasonable fear that if he came forward with more persuasive evidence, the government could transfer him back to the civilian courts and use that evidence against him. Id. The Court should find that Ahmed was entitled to challenge the constitutionality of the process being afforded to him before his writ was dismissed.

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests that this Court reverse the judgment below that the President has the legal authority to detain him as an "enemy combatant," remand the case with instructions to grant the habeas corpus petition and direct the military to release the Petitioner from custody.

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Team Number: 8761