

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 OF PETITIONER

TEAM NO. **9213**

QUESTIONS PRESENTED

1. Whether the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), 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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The opinion of the court of appeals (Record on Appeal at 5-46) is available online. *Ahmed v. United States*, No. 06-9701 (12th Cir. Nov. 24, 2008), http://www.acslaw.org/pdf/2010%20Moot%20Court%20Problem%20Final%20_1-5-10_.pdf.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 21, 2008. The petitions for a writ of certiorari were granted on October 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

In response to the terrorist attacks committed by al Qaeda on September 11, 2001, Congress passed the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." AUMF, 115 Stat. 224.

Petitioner Burhan Uddin Ahmed, a citizen of Pakistan, lawfully entered the United States with his family on September 8, 2001 for the purpose of attending Wilson University in Wilson, East Dakota to pursue a degree in veterinary medicine.

(Record 7). However, after only four months, federal agents arrested and detained Ahmed in Wilson as a material witness in the investigation of the terrorist attacks on September 11th. *Id.* Eleven months later, in November 2002, Ahmed was finally charged with possession of counterfeit Social Security cards with the intent to defraud. *Id.* Three months later, in January 2003, Ahmed was charged with making a false statement to the FBI. *Id.* Ahmed entered a plea of not guilty to all of the charges. *Id.*

The district court set a trial date for July 17, 2003. *Id.* Ahmed submitted a motion to suppress evidence that he asserted was obtained by torture. *Id.* The hearing for the motion was scheduled for June 15, 2003. *Id.* However, before the hearing could take place, the Government filed an ex parte motion to dismiss the indictment, citing an order signed by the President of the United States. *Id.*

In this order, the President

stated that he had 'DETERMINED for the United States of America that' Ahmed: (1) is an enemy combatant; (2) is closely associated with al Qaeda; (3) 'engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism'; (4) 'possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda'; and (5) 'represents a continuing, present, and grave danger to the national security of the United States.'"

Id.

Additionally, the President determined Ahmed should be detained indefinitely as an enemy combatant in order to prevent Ahmed from further aiding al Qaeda. *Id.* Pursuant to the President's order, the district court granted the Government's motion to dismiss the charges against Ahmed. *Id.* Ahmed was then transferred into military custody and has been detained since that time without charge or trial or any "indication as to when his detention will end." *Id.* at 8.

After being transferred into military custody, Ahmed filed a petition for writ of habeas corpus in the District of East Dakota under 28 U.S.C § 2241. *Id.* In his petition, Ahmed claimed that his detention as an enemy combatant was unconstitutional and that he must be charged with a crime or released. *Id.* Alternatively, Ahmed asserted that he must be allowed to challenge the factual basis for his detention. *Id.*

In response, the Government asserted that Ahmed is associated with the terrorist group al Qaeda and has aided in its preparation for terrorist acts. *Id.* Further, the Government claimed that the President's broad authority under the AUMF, coupled with his inherent war powers under the constitution, allows him to indefinitely detain those, including Ahmed, that associate with al Qaeda and aid its preparation for terrorist acts. *Id.*

In support of its allegations against Ahmed, the Government provided the hearsay declaration of John R. Murphy (Murphy Declaration), the Director of the Joint Task Force for Combating Terrorism. *Id.* In his declaration, Murphy concluded that Ahmed was a sleeper agent for al Qaeda, that he has trained with al Qaeda, that he communicated with high ranking al Qaeda members, including Osama Bin Laden, that he entered the United States to commit terrorist acts, and that he possesses valuable intelligence against al Qaeda. *Id.* 8-9.

Based on this evidence, the district court determined that Ahmed could be detained as an enemy combatant, but that due process entitled him to challenge the factual basis for his detention. *Id.* at 9. The district court referred the case to a magistrate judge to determine exactly what process Ahmed should be granted. *Id.* The judge dismissed Ahmed's claims that he was entitled to full habeas proceedings and, instead, determined that the Government must merely provide Ahmed with notice of the factual basis for his detention and, if the government could produce credible evidence to support his designation as an enemy combat, the burden would then shift to Ahmed to refute this evidence. *Id.* If Ahmed could do so, only then would he be entitled to a full adversarial proceeding with full procedural safeguards. *Id.*

The magistrate judge concluded that the Murphy Declaration had provided Ahmed with adequate notice of the factual basis for his detention and had provided sufficient evidence to support Ahmed's designation as an enemy combatant. The judge then gave Ahmed 60 days to refute his designation with more credible evidence.

Ahmed responded that he was not an enemy combatant, but refused offer evidence to rebut the Government's claims, claiming that being forced to prove his own innocence was unconstitutional. *Id.* at 9-10. The magistrate judge then recommended that his petition for writ of habeas corpus be dismissed. The district court agreed and subsequently dismissed Ahmed's petition. *Id.* at 10.

Ahmed then appealed to the Twelfth Circuit Court of Appeals, challenging to the President's authority to detain him as an enemy combatant and arguing that the procedures implemented by the district court violated his right to due process under the Fifth Amendment. *Id.* In a three-way split, a plurality of the court of appeals held that, if the allegations against Ahmed are true, the AUMF does authorize the President to detain Ahmed. *Id.* at 28. However, the plurality also held that, as a legal resident detained within the United States, Ahmed has not been afforded sufficient process to challenge his designation as an enemy combatant, as required by the Fifth

Amendment. *Id.* As a result, the Twelfth Circuit reversed the district court's holding on the level process to which Ahmed is entitled and remanded the matter back to the district court for further proceedings. *Id.*

It is from that decision that Ahmed appeals to this Court.

SUMMARY OF THE ARGUMENT

The President asserts that Ahmed, a lawfully admitted alien residing in the United States, to whom due process to extended, is an "enemy combatant." The President seeks to subject Ahmed to indefinite military detention, without criminal charge or trial, due to his alleged combatant status. However, Ahmed is not an "enemy combatant," and to label him as such contravenes constitutional and law-of-war distinctions between civilians and combatants. Congress never provided a clear Congressional statement to serve as the basis for subjecting lawfully admitted alien residents to indefinite military detention. Instead, it provided clear provisions of the exact opposite: lawfully admitted resident aliens suspected of terrorist activity must be criminally charged within a designated period after their initial detention. The President claims authority that is contrary to Congress' intent, and possesses no inherent Constitutional authority that surpasses this clear intent.

Furthermore, Ahmed has not yet been afforded sufficient opportunity, consistent with the requirements of the Fifth Amendment, to challenge his designation as an enemy combatant. Applying recent Supreme Court precedent, the 12th Circuit correctly held that the district court did not properly weigh the interests of Ahmed and the government, and, therefore, did not afford Ahmed with sufficient process. The government asserts that the district court should accept hearsay evidence as their "most reliable evidence." However, the government has not made a showing that there is such great difficulty, under the circumstances, in presenting such evidence that necessitates its acceptance. Moreover, the government's failure to demonstrate exigent circumstances sufficient to admit hearsay evidence, an evidentiary burden-shifting approach from the government to Ahmed is not appropriate in the case at bar.

STANDARD OF REVIEW

In reviewing the consideration of a petition for a writ of habeas corpus, the Court of Appeals reviews the district court's legal conclusions de novo and its findings of fact for clear error. *Colvin v. Taylor*, 324 F.3d 583, 586 (8th Cir. 2003).

ARGUMENT

I. The President does not have legal authority to subject lawful United States residents to indefinite military detention.

The Constitution guarantees that no “person” shall “be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V; *see also id.* amend. XIV, § 1. “Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). This constitutional protection extends to all citizens, as well as lawfully admitted aliens, living within the United States, *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), including foreign nationals. *Boumediene v. Bush*, 128 S.Ct. 2229, 2246 (2008). One limitation to this general principle includes a President’s congressional authorization to order military detention, without criminal charge or trial, of those who are deemed “enemy combatants.” *See Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).¹ In *Hamdi*, the Court held that the Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224 (2001) was sufficient congressional authorization to support such detention. *Hamdi*, 542 U.S. 507, 516-17.

¹All citations to *Hamdi* are to the plurality opinion unless otherwise indicated.

In *Hamdi*, the Supreme Court stressed that its focus was only on the President's authority to detain a "limited category" of individuals "who fought against the United States in Afghanistan." *Hamdi* at 516-18. The Court held that the petitioner was subject to indefinite military detention because he satisfied two required elements to become an "enemy combatant": (1) he "associated with forces hostile to the United States in Afghanistan," and (2) he "took up arms against the United States forces in that country in the same way and to the same extent as did Hamdi." *Id.* at 516.

The record does not indicate any evidence or assertion that Ahmed has taken up arms against the United States in Afghanistan. (R. 10-19, 47, 48.) However, the President claims that he has the power to indefinitely detain Ahmed as an "enemy combatant," even though he is a lawful United States resident who was arrested in the United States by civilian authorities. (R. 7-8.) Allowing such a detention has broad implications to all persons protected by the Due Process Clause. Under the President's claim of power, any person in the United States may be detained by the military based upon alleged associations with terrorist organizations. Brief for Appellants at 2-3, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). The President does not possess such authority either through Congressional or Constitutional authorization.

A. Ahmed's detention as an "enemy combatant" contravenes constitutional and law-of-war distinctions between civilians and combatants.

The AUMF must be applied consistently with "longstanding law-of-war principles." *Hamdi v. Rumsfeld*, 542 U.S. at 521 (2004). These principles help outline the constitutional parameters of military and civilian jurisdiction and the distinctions between them. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *Ex parte Milligan*, 71 U.S. 2, 126-27, 131 (1866).

In *Ex parte Milligan*, an Indiana resident during the Civil War was deemed a civilian subject to criminal trial, even though he was a "dangerous enem[y]" accused of "enormous crimes" as part of a "secret enemy organization[]" that wanted to "overthrow the Government." *Milligan*, 71 U.S. 2, 6, 130. The fact "central to [*Milligan's*] conclusion" was that Milligan was not a prisoner of war (i.e. a combatant). *Hamdi* at 522 (2004). Unlike Milligan, Hamdi has associated with, and has taken up arms against the United States on behalf of one of its enemies, and has therefore been rightfully designated an enemy combatant. *See Hamdi* at 516, 522 n.1 (2004); accord *Padilla v. Hanft*, 423 F.3d 386, 396 (4th Cir. 2005). Moreover, *Hamdi* noted that "[*Milligan*] does not undermine our holding about the Government's authority to seize enemy combatants, as we define the term today." *Hamdi* at 521-22 (emphasis added). *Hamdi* further elaborated 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 [*Milligan*] might well have been different." *Id.* at 522.

Hamdi supports *Milligan's* application to the case at bar. These cases demonstrate that whether one can be detained as an "enemy combatant" depends on whether he or she is a combatant under the law of war. Brief for Appellants at 5, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). Here, Ahmed is accused of being a dangerous enemy and committing enormous crimes as part of an enemy organization. *Milligan* at 2, 6, 130. He nevertheless has not taken up arms against the United States on behalf of al-Qaeda in Afghanistan, and therefore is not an "enemy combatant" under the frameworks of *Hamdi* or *Milligan*.

The Watts opinion dismisses the import of *Milligan* without adequate justification. (R. 16-17.) It claims that "Congress never authorized the use of force against [*Milligan's*] organization." *Id.* Judge Gray's concurring opinion is correct to note that such fact is immaterial because the United States was at war with the Confederacy, and *Milligan* was accused of being a Confederate agent. (R. 35-36.) Furthermore, even if Ahmed was present at an al Qaeda training camp between 1996 and 1998, as alleged (R. 47), it does not make him an "enemy combatant" within the *Hamdi* framework because the United States was not in an armed conflict in Afghanistan at that time. *Hamdan v.*

Rumsfeld, 548 U.S. 557, 600 (2006). Furthermore, the Murphy Declaration does not assert that Ahmed directly participated in any hostilities against United States or allied forces. (R. 47-48.)

The Watts opinion relies heavily on *Ex parte Quirin*, 317 U.S. 1 (1942), claiming that Ahmed is similarly situated to the defendants in *Quirin*. (R. 12, 16-17.) The *Quirin* Court held that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.” *Quirin*, 317 U.S. at 37-38. The Watts opinion ignores the fact that *Hamdi* is founded on *Quirin*’s central principle: enemy combatant status rests on an individual’s association with the *military arm of the enemy government*. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 230 (2008). Here, al Qaeda is not an enemy government, nor is it the “military arm” of any enemy government.

B. Congress has not provided a clear statement sufficient to authorize Ahmed’s indefinite military detention.

If Congress wished to grant the President the power to indefinitely detain lawful United States residents who are not “enemy combatants,” it could and would have said so in a clear statement. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 239 (2008); *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (dismissing an argument that executive orders and statutes permitted the

deprivation of liberty rights absent "explicit authorization"). In *Ex parte Endo*, the Court held that Congress did not authorize the President to detain concededly loyal U.S. citizens of Japanese heritage during World War II. *Ex parte Endo*, 323 U.S. 283, 302-303 (1944). The *Endo* Court articulated that "[i]n interpreting a wartime measure," the Court "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.* at 300. In *Duncan v. Kahanamoku*, the Court declined to interpret the Hawaii Organic Act's ambiguous provisions as authorizing the trial of civilians by military commission. *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946). Furthermore, the Supreme Court has rejected the argument that executive orders and statutes permit deprivation of liberty rights absent "explicit authorization." *Greene v. McElroy*, 360 U.S. 474, 508 (1959). However, the Court in *Ex parte Quirin* did not require a clear congressional statement before holding that the enemy combatant in that case could be subject to a military commission trial even though neither the authorization to use force nor the authorization for military commissions specifically mentioned United States citizens. Curtis A. Bradley and Jack L. Goldsmith, *Congressional*

Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2105 (2005). (citing *Ex parte Quirin*, 317 U.S. 1, 44 (1942)).

Endo, *Duncan*, and *Greene* strongly suggest that when the President is acting against a non-combatant and a United States citizen (or lawful resident), his Commander-in-chief privilege is diminished and the canon protecting constitutional liberties prevails. *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2105 (2005). Conversely, as seen in *Quirin*, the President's Commander-in-chief privilege is not reduced where a defendant's liberty interest is diminished due to his enemy combatant status. *Id.* Moreover, a clear statement is required for Congress to interpret a statute that "invokes the outer limits of Congress' power." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001).

The Watts opinion interprets the AUMF in a way that dismisses the traditional distinction between combatant and civilian and the clear context underlying both *Hamdi* and *Padilla*, particularly, the fact that the petitioners in those cases were enemy combatants. See Brief for Appellants at 14, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). In the case at bar, Ahmed's liberty interest should prevail over the President's Commander-in-chief privilege because he is a lawful United States resident who does not meet the "enemy combatant" requirements as set forth in *Hamdi*. Therefore, a clear

congressional statement should be required if the President is allowed to indefinitely detain those similarly situated to *Ahmed*.

C. Congress has made a clear statement sufficient to preclude Ahmed's indefinite military detention by enacting the Patriot Act.

If there is any clear statement that indicates whether Congress intended to detain suspected alien terrorists arrested in the United States as "enemy combatants," it can be found in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("Patriot Act"), which was enacted thirty-eight days later after the AUMF was enacted. Pub. L. No. 107-56, 115 Stat. 272 (2001) (Patriot Act). The Act mandated that aliens suspected of engaging in or planning to engage in terrorist activity in the United States be charged with a criminal offense within seven days of arrest. 8 U.S.C. 1226(a)(5). Section 412 of the Patriot Act applies to any alien in the United States who, *inter alia*, received "military-type training" from a terrorist organization, including al-Qaeda, 8 U.S.C. 1182(a)(3)(B)(i)(VIII); has prepared or is planning a terrorist activity, 8 U.S.C. 1182(a)(3)(B)(iv)(II); or has associated with a terrorist organization and intends to engage in activities that "could endanger the welfare, safety, or security of the United States, 8 U.S.C. 1182(a)(3)(F).

The Patriot Act is a clear statement from Congress that restricts the indefinite detention of suspected alien terrorists, arrested in the United States, without charge or trial. The noted provisions of the Patriot Act accurately describe the basis asserted by the president to detain Ahmed. (R. 7.) The Watts opinion claims that "because [the AUMF and the Patriot Act] deal with different powers of the President," then the Patriot Act's provisions do not apply to Ahmed. *Id.* at 17, n.2. However, the President "may not disregard limitations that Congress has placed on his powers." *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); accord *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Admittedly, the Patriot Act's provisions did not apply in *Hamdi* because the President was exercising his power as Commander-in-chief (further augmented by the AUMF) over enemy combatants. However, Ahmed is not an enemy combatant. Therefore, the law governing Ahmed's detention is within the provisions of the Patriot Act, and not the AUMF.

D. The President does not have inherent constitutional authority to subject Ahmed to indefinite military detention.

The claim in the Watts opinion that the President may indefinitely detain Ahmed is contrary to Congress's express will detailed in the Patriot Act. Pub. L. No. 107-56, 115 Stat. 272 (2001). "When the President takes measures incompatible with the

expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 637 (1952) (Jackson, J., concurring). In the case at bar, the Court "must scrutinize[] with caution" the claim that the Constitution grants the President the power to indefinitely detain Ahmed against Congress's will. *Id.* at 638 (Jackson, J., concurring).

"That military powers of the Commander-in-chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history." *Id.* at 644 (Jackson, J., concurring). It is notable that in the Declaration of Independence, our Founders complained that the King of Great Britain "affected to render the Military independent of and superior to Civil power" and that the King had "depriv[ed] us in many cases, of the benefits of Trial by Jury." *The Declaration of Independence* paras. 14, 20 (U.S. 1776). The Supreme Court has recognized the Founders' purpose "to keep the military strictly within its proper sphere, subordinate to civil authority." *Reid v. Covert*, 354 U.S. 1, 30 (1957). In light of this fundamental principle, the Supreme Court rejected the President's claim of "inherent power" to use the military even to seize property within the United States,

despite the Government's argument that the refusal would "endanger the well-being and safety of the nation." *Al-Marri v. Pucciarelli*, 534 F.3d 213, 251 (4th Cir. 2008) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952)).

Presently, the President seeks to let military authority usurp the civil authority of the United States. In effect, the President claims that his military powers of Commander-in-chief allow him to supersede Congress' intent in governing what is an *internal affair*. *Youngstown* at 644 (Jackson, J., concurring). The Patriot Act demonstrates that Congress intends to subject aliens terrorists to the criminal justice system, not to indefinite military detention without charge or trial. Pub. L. No. 107-56, 115 Stat. 272 (2001). If the President were permitted to subject Ahmed to indefinite military detention without charge or trial, he would be operating against the will of Congress and disregarding what the Founders complained of at the outset of our Nation's beginning. However, the President does not possess inherent constitutional authority to act this way, and Ahmed's indefinite military detention is therefore unconstitutional.

II. The court of appeals was correct in holding that Ahmed has not been afforded sufficient process under the *Hamdi* framework to challenge his designation as an enemy combatant under the requirements of the Fifth Amendment.

The Supreme Court has consistently held that “the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The Court has also held “that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.” *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)).

In *Hamdi v. Rumsfeld*, the Supreme Court established the framework for deciding “what process is due to a citizen² who disputes his enemy-combatant status.” 542 U.S. 507, 524 (2004). The framework set out in *Hamdi* is equally applicable to the question here: whether the district court afforded Ahmed sufficient process under the requirements of the Fifth Amendment.

² Though Ahmed is not a citizen of the United States, the Supreme Court has repeatedly held that aliens residing in United States enjoy full protection under the Fifth Amendment. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] Amendments”).

A. The *Hamdi* Framework

In determining whether Mr. Ahmed had been afforded sufficient process, the district court and the court of appeals correctly looked to the framework established by the Supreme Court in *Hamdi*. There, Hamdi, an American citizen, was designated as an enemy combatant and subsequently detained, having being captured on a battlefield in Afghanistan by allies of the United States. *Id.* at 510. Hamdi's father filed for a writ of habeas corpus on his son's behalf, arguing that Hamdi's detention directly violated his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution. *Id.* at 511. In support of its determination that Hamdi was an enemy combatant, the Government offered a hearsay statement from defense department official Michael Mobbs, (Mobbs Declaration), claiming that Hamdi had been heavily involved with terrorist groups in armed conflict with the United States. *Id.* at 512-13.

The Government asserted that in habeas proceedings for detainees designated as enemy combatants the court should either "eliminate entirely any individual process," limiting courts to the single question of whether the detention is authorized under the law, or, at the very least, review the Government's determination using the "very deferential 'some evidence' standard." *Id.* at 527. Habeas proceedings in these instances,

the Government argued, should be limited out of “respect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict.” *Id.*

In response, Hamdi noted that the Supreme Court has repeatedly held “that an individual challenging his detention may not be held at the will of the Executive without recourse to some neutral tribunal to determine whether the Executive’s asserted justifications for that detention have basis in fact and warrant in law.” *Id.* at 528. Further, Hamdi claimed that “due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counterevidence.” *Id.*

The Court acknowledged that while both “positions highlight legitimate concerns,” *Id.* at 528, neither position “strikes the proper constitutional balance.” *Id.* at 532. Therefore, in order to balance “such serious competing interests” and to ensure that the process afforded is sufficient under the Fifth Amendment, the *Hamdi* plurality applied the test articulated in *Mathews v. Aldridge*, 424 U.S. 319 (1976). *Id.* at 528–29. The *Mathews* test states that “the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government

would face in providing greater process." *Id.* at 529 (quoting *Mathews*, 424 U.S. at 335).

Applying the *Mathews* test, the *Hamdi* plurality held that due process requires "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533. These core constitutional rights, the Court held, "may not be eroded" in spite of any potential burdens they may impose on the Government. *Id.* at 533. However, the Court also held that, aside from those core rights, the "exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.*

As examples, the plurality proposed that hearsay "may need to be accepted as the most reliable available evidence from the Government," *Id.* at 533-34, and that "a presumption in favor of the Government's evidence" would be appropriate "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal was provided." *Id.* at 534. The Court reasoned that this "basic process" would sufficiently protect a detainee's interests while eliminating extraneous procedures that overly burdened the Government. *Id.* at 534.

- B. Applying the *Hamdi* framework, the court of appeals correctly determined that the district court did not adequately weigh the interests of the parties and, therefore, failed to afford Ahmed with sufficient process.**

In *Hamdi*, the Supreme Court held that full habeas proceedings for enemy combatant petitioners *may* be adapted to lighten any unusually heavy burdens they might place on the Government. *Id.* at 533. *Hamdi* also established the lowest level of process due an enemy combatant petitioner in those cases, beyond which habeas proceedings could not be restricted. *Id.* An enemy combatant challenging his status is entitled to a *minimum* level of process: "notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.*

However, the *Hamdi* plurality did not hold that proceedings *must* be modified or that the Government's evidentiary burden *must* shift to the petitioner. *Id.* As the court of appeals noted, "the *Hamdi* plurality clearly considered the context of *Hamdi*'s battlefield capture and detention, and the unique burdens that would be imposed on the military in the midst of an on-going conflict" when it determined that full habeas proceedings were not necessary. (R. 24).

Hamdi merely established the principle that full habeas proceedings *may* be limited for enemy combatant petitioners in certain, limited circumstances. *Hamdi* at 529. For instance, as

in *Hamdi*, when the evidentiary or procedural burdens upon the Government sufficiently outweigh the detainee's interest in preventing erroneous deprivation, procedures that have little or no value may be eliminated. *Id.* at 534. However, if the Government cannot demonstrate that these exigencies exist, *Hamdi* gave no indication that full habeas proceedings, or at least something more than basic process, should not be provided.

1. **Because the Government failed to show that full habeas proceedings would be unduly burdensome, the basic process set forth in *Hamdi* is not justified here.**

As the plurality in the court of appeals noted, "the factual circumstances surrounding Ahmed's capture and detention are dramatically different [than Hamdi's], making the procedural protections to which he is constitutionally required correspondingly different." (R. 26). Under the *Hamdi* framework, habeas proceedings for enemy combatant petitioners may be limited only when standard procedural protections would be overly burdensome to the Government. *Hamdi*, 542 U.S. at 533.

In *Hamdi*, the burden on the Government to produce evidence outside of the Mobbs Declaration was substantial. *Id.* at 530-32. Hamdi was captured and initially detained in a war zone by soldiers of both the United States and its Afghan allies. *Id.* Potential witnesses were thousands of miles away, often involved in active military duties and potential evidence was possibly "buried under the rubble of war." *Id.* at 533.

Here, the circumstances of Ahmed's capture are dramatically different and the evidentiary and procedural burdens on the Government are significantly lower. Ahmed was a graduate student living with his family at the time of his arrest by civilian authorities. (R. 7). Nearly all of the evidence collected, examined, and cited against Ahmed in the Murphy Declaration is readily accessible and located within the United States. *Id.* at 47-48. The burden for the Government to produce the necessary witnesses and evidence required for a traditional habeas proceeding would be no greater here than in any other proceeding before the district court.

The plurality for the court of appeals correctly notes that "the district court retains the authority to weigh the interests of the parties and structure the proceedings in a way that will be consistent with the demands of the Constitution." (R. 27). However, under the *Hamdi* framework, unless the Government can show that providing full procedural protections, in addition to basic process, would be unduly burdensome, Ahmed is entitled to those procedural protections. The Government did not make that showing and the district court did not adequately weigh the evidentiary and procedural burdens against the Government. Therefore, the court of appeals correctly determined "that the district court erred in the process it afforded Ahmed in his habeas proceeding." (R. 28).

a. Hearsay testimony should not be allowed as "most reliable evidence."

In *Hamdi*, the Court suggested several methods for compensating for the procedural and evidentiary imbalance that was created by the extraordinary circumstances of Hamdi's capture and detention. *Hamdi*, 542 U.S. at 533-34. The first of these was that hearsay evidence "may need to be accepted as the most reliable evidence" from the Government. *Id.*

Presumably, the Court made this suggestion in response to the Government's offer of the Mobbs Declaration as the sole support for the detention of Hamdi. Even though the Mobbs Declaration is unsubstantiated hearsay evidence, the Government argued that the Court should "assume the accuracy of the . . . Mobbs Declaration, and assess only whether that articulated basis [is] a legitimate one. *Id.* at 527-28. The Government reasoned that the extreme difficulty in presenting evidence and testimony during an ongoing military conflict justifies a certain level of deference to the Executive. *Id.*

Here, the Government has submitted similar evidence in the form of the Declaration of John R. Murphy (Murphy Declaration), the Director of the Joint Intelligence Task Force for Combating Terrorism. (R. 47-48). The Murphy Declaration presents a number of claims against Ahmed, however the no further evidence has been offered to substantiate those claims. As discussed above, however, the exigencies that existed in *Hamdi* do not exist here.

Contrary to *Hamdi*, where the Government sufficiently demonstrated that full evidentiary procedures were unduly burdensome, here the Government has made no showing that necessitates the acceptance of hearsay evidence as the "most reliable evidence." Unless similar exigencies are shown to exist here, it would be improper to allow the Murphy Declaration, a hearsay statement, to be submitted as the "most reliable evidence."

b. The "burden-shifting scheme" proposed in *Hamdi* should not be applied here.

The second method proposed in *Hamdi* was to shift the evidentiary burden from the Government to the petitioner. *Hamdi*, 542 U.S. at 534. The Court held that "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 fair opportunity for rebuttal were provided." *Id.* More specifically, "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside of the criteria." *Id.*

Given that the court specifically conditioned this proposal upon the exigencies that existed in *Hamdi*, it is only logical to assume that similar exigencies need to exist for the same scheme to apply here. Given that the circumstance surrounding Ahmed's

capture and detention fail to present the same type of exigencies that existed in *Hamdi*, the burden shifting scheme established there should not be applied here.

CONCLUSION

For the foregoing reasons, the district court's judgment denying the petition for writ of habeas corpus should be reversed.

Respectfully Submitted,

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