

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 OF PETITIONER, BURHAN UDDIN AHMED

Counsel for Petitioner, Burhan Uddin Ahmed
Team Number **9922**

QUESTIONS PRESENTED

1. Whether the President lacks the authority, under both the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF) and the Constitution, to seize and subject a person lawfully residing in the United States to indefinite military detention without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?

2. Whether the minimal process afforded to the Petitioner by the district court was insufficient to allow a person designated as an enemy combatant, being indefinitely detained by the government without trial, a meaningful opportunity to challenge that designation?

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8 U.S.C. § 1182
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JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on November 24, 2008. The petition for writ of certiorari was granted on October 2, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 2241.

STATUTORY PROVISION INVOLVED

In relevant part, the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) provides:

[Section 2] (a) In General. That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

STATEMENT OF THE CASE

Petitioner Burhan Uddin Ahmed is currently being detained by the United States Military as an enemy combatant. He has not been charged or tried for any crime, and he has been given no indication when, or if, he will be released.

Ahmed, a citizen of Pakistan, legally entered the United States with his family to attend veterinary school in East Dakota. On January 3, 2002, federal agents arrested Ahmed in East Dakota as a material witness in the ongoing investigation of the 9/11 attacks. He was thereafter detained in East Dakota.

In November 2002, the government charged Ahmed in the District of East Dakota with the possession of counterfeit Social Security Cards with the intent to defraud. In January 2003, Ahmed was further charged with making a false statement to the FBI. Ahmed pled not guilty to both charges. But, a month before Ahmed's trial date the government filed an ex parte motion to dismiss the indictment based on an executive order designating Ahmed as an enemy combatant.

The substance of the executive order contained the following allegations: that Ahmed had ties to al Qaeda, prepared for acts of international terrorism, had

intelligence that would aid U.S. officials, and was a continuing national security threat. The executive order alleged no ties to the Taliban government of Afghanistan, or with any other government with which the United States is currently engaged in hostilities.

The District Court granted the government's motion and Ahmed was transferred into military custody, where he remains today. After his transfer, Ahmed filed a petition for a writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241, demanding that the government either file criminal charges or release him.

Alternatively, Ahmed argued that he was entitled to challenge the factual basis of his designation at a hearing.

Contesting his release, the government again claimed that Ahmed was a member of al Qaeda, and provided the court with a hearsay document prepared by John R. Murphy, Director of the Joint Task Force for Combating Terrorism. The document set out several assertions, including that Ahmed was trained by al Qaeda in the use of poisons, met Osama bin Laden, and was investigating the possibility of hacking into and disrupting the Social Security Administration's computer mainframe. See Murphy Aff. Ex. A ¶ 6, 7, 11. No information is provided as to the sources

of these accusations. Based on this hearsay document, the district court agreed that Ahmed could be indefinitely detained as an enemy combatant, but held that pursuant to his due process rights, he was entitled to a factual hearing to challenge that designation. The district court assigned a magistrate judge to determine what process was due to Ahmed.

The magistrate judge found that the government need only provide Ahmed with notice of the factual basis of his detention. If the government could produce some credible evidence supporting his designation as an enemy combatant, the burden of proof shifted to Ahmed, who was then responsible for proving his innocence with more persuasive evidence.

The magistrate judge further concluded that these minimal procedural safeguards had already been met in Ahmed's case: standing alone, the hearsay Murphy Declaration, the magistrate judge reasoned, constituted both notice as to the factual basis of his detention, and credible evidence of his status as an enemy combatant.

Ahmed responded with a general denial of the allegations against him, and refused to produce evidence as part of the "hearing." Instead, Ahmed argued that the process the district court provided him was

unconstitutional, and forced him to prove his own innocence. The magistrate judge then recommended that the writ of habeas corpus be dismissed. The district court agreed, dismissing the case, and Ahmed appealed to the 12th Circuit Court of Appeals.

A plurality of the 12th Circuit, sitting en banc, agreed with the district court that the President had the power to indefinitely detain Ahmed as an enemy combatant. However, the plurality opinion found that the process the district court afforded to Ahmed to challenge his detention was unconstitutional.

SUMMARY OF THE ARGUMENT

PRESIDENTIAL AUTHORITY

The President does not have the authority under either the Authorization for Use of Military Force (AUMF), or under his constitutional power as commander-in-chief of the armed forces to militarily detain Ahmed, indefinitely and without trial.

This Court, in *Hamdi v. Rumsfeld*, held that the AUMF allows for detention of the narrowly defined legal category of enemy combatants. See 542 U.S. 507, 517 (2004). Although the AUMF does not reference detention, this Court reasoned that detention of enemy combatants - individuals associated with the military arm of a government with which

the United States is at war - was "necessary and appropriate" for the limited purpose of preventing those individuals from returning to the battlefield. *Id.* at 518.

Ahmed does not fit the definition of an enemy combatant but is a civilian who, the government alleges, aided al Qaeda. Ahmed, like any civilian, cannot be indefinitely detained by the military, but must be either charged with a crime, or released. This Court's precedent in *Ex parte Milligan*, provides clear support for this proposition. See 71 U.S. 2 (1866). Because he is not an enemy combatant, the President cannot detain Ahmed under the AUMF.

Furthermore, the Constitution does not provide the President with any inherent power to detain civilians such as Ahmed. Congress has spoken on the issue of detaining suspected terrorist aliens such as Ahmed in the Patriot Act, meaning that the President's actions directly contradict a congressional directive. Therefore, even if the AUMF did in some way authorize the detention of Ahmed, the President must follow the procedures that Congress explicitly created in the Patriot Act that pertain to the detention of enemy or terrorist aliens.

Lastly, this Court has never held that the President's war powers as commander-in-chief can be turned against

civilians, no matter what crimes they are alleged to have committed. This Court should maintain the balance between security and liberty by refusing the President's claims of authority, and by forcing the government to charge, deport, or release Ahmed pursuant to the law.

DUE PROCESS

Ahmed, a lawful United States resident alien entitled to Constitutional protections, was not given a meaningful opportunity to challenge his designation as an enemy combatant. To require Ahmed to attempt to prove his own innocence, with no access to the evidence against him, violated his Fifth Amendment right to due process.

To determine the processes that must be afforded to persons facing the loss of an important right, courts must weigh the individual or private interests at stake against the public interest or societal cost, while considering the added accuracy enhanced procedures would provide. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). Ahmed faces deprivation of what is, aside from life, the most fundamental of interests: freedom from indefinite imprisonment. Although the government also has a strong interest in maintaining national security, Ahmed can be given a meaningful opportunity to challenge his detention without harming that interest.

Ahmed's need for procedural protection is far greater than the need presented in *Hamdi v. Rumsfeld*, where the Court approved the procedures given to Ahmed here. See 524 U.S. 507 (2004). Ahmed's case has significant differences that set it apart from *Hamdi*, such as the circumstances of Ahmed's capture and the greater availability of the evidence against him. Under these circumstances, if the government is not required to prove the reliability of its evidence and explain why its sources cannot be revealed, no particularized balancing of interests can occur and Ahmed is left without a meaningful opportunity to defend himself.

ARGUMENT

I. THE PRESIDENT DOES NOT HAVE THE AUTHORITY TO INDEFINITELY CONFINE AHMED

A. The AUMF Does Not Grant The President The Authority To Detain Civilians

Congress enacted the Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), shortly after the tragic attacks that occurred on September 11, 2001. The AUMF authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [September 11] terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States. . . .

.” See *id.* The broad language contained in the AUMF has been interpreted by this Court to apply only to enemy combatants: a legal category defined as a person that is or was “carrying a weapon against American troops on a foreign battlefield.” See *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n. 1 (2004). The government asks this Court to expand the definition of an enemy combatant beyond any previous construction of the term, effectively allowing the President to indefinitely detain without trial a broader class of persons unaffiliated with any military arm of a nation at war with the United States.

Because Ahmed has never been a part of any nation’s army and has never carried a weapon against the United States on a foreign battlefield, he is not an enemy combatant and cannot be detained under the AUMF. The government has blurred the fundamentally important distinction between a civilian and an enemy combatant. Civilians, no matter how heinous the government’s allegations are against them, are entitled to be heard in an Article III court. See *Ex parte Milligan*, 71 U.S. 2, 82 – 83; *United States ex rel Toth v. Quarles*, 350 U.S. 11, 15 (1955) (“It is the primary, indeed the sole business of [Article III] courts to try cases and controversies between . . . individuals and the Government . . . includ[ing]

trial of criminal cases.”). A person who is not a part of an enemy nation’s armed forces cannot be treated as an enemy combatant, even when that person has engaged in a conspiracy to aid the enemy. See *Milligan*, 71 U.S. at 83; *Hamdi*, 542 U.S. at 522. Rather, such persons are entitled to the protections of a criminal trial that the Constitution guarantees. See *Milligan*, 71 U.S. at 78.

Enemy combatants, on the other hand, are persons who are engaged in armed conflict against the United States and can be legally detained until the close of hostilities. See *Hamdi* 542 U.S. at 521. The purpose of such confinement is not punitive per se, but is meant to ensure that a captured enemy cannot return to the battlefield before cessation of the hostilities. See *id.* at 518 (“The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.”). Detention of enemy combatants arises out of the necessities of armed conflict, and can therefore be employed against an individual who is “part of or supporting forces hostile to the United States . . . [in a foreign battlefield] and who engaged in an armed conflict against the United States there.” See *id.* at 516 (internal quotations and citations omitted). See also *Ex parte Quirin*, 317 U.S. 1, 15-16 (1946) (recognizing spies sent to

the United States by the German Reich to commit acts of sabotage as enemy combatants based on their association with the military arm of an enemy government).

Because Ahmed is not alleged to have been associated in any way with the Taliban or any other government with which the United States is at war, he cannot be considered an enemy combatant and cannot be indefinitely detained under the AUMF. Therefore, the facts of this case do not fall into the *Quirin* line of cases authorizing confinement of enemy combatants. See *id.* (prisoner employed by the German Reich); *Hamdi* (prisoner was captured fighting against U.S. forces in Afghanistan alongside Taliban forces). See also *Padilla v. Hanft*, 423 F. 3d 386, 391 (prisoner fought alongside the Taliban in Afghanistan).

Rather, the facts of this case are strikingly similar to those present in *Ex parte Milligan*. Like Milligan, Ahmed allegedly conspired to commit acts of sabotage and terrorism with the aim of overthrowing the United States government. See *Murphy Aff. Ex. A* ¶ 19. Importantly, and also like Milligan, Ahmed was not a member of any nation's armed forces. See *id.* If the government's allegations are true, Ahmed undoubtedly violated multiple federal laws, but must be indicted by a grand jury and tried for those crimes in a civilian court. See *Milligan* 71 U.S. at 82.

The requirement that a person must be associated with an enemy government before the President can confer on him the status of an enemy combatant is necessary to preserve fundamental civil liberties. The requirement may seem overly formalistic to some, especially in light of the seriousness of the demonstrated threat that al Qaeda poses to the citizens of this country. However, concerns for security cannot eviscerate those of liberty. See *Milligan* 71 U.S. at 79 (“[I]t could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.”). By adhering to the narrow reading of the AUMF this Court adopted in *Hamdi*, this Court will protect the President’s power to effectively carry out the war effort while ensuring that the same power does not subsume fundamental civil liberties that the Constitution grants and that this Court is charged to protect.

B. The President Has No Authority Inherent In The Constitution To Indefinitely Detain Ahmed

Courts evaluate claims of executive power using the framework established by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring). “When the President acts pursuant to an express or implied

authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (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, 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. Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.*

Given the strict limitations on detainment of enemy aliens Congress established in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272, the President's indefinite detainment of Ahmed is incompatible with the will of Congress. As discussed above, the AUMF does not apply to persons in Ahmed's situation, but only to enemy combatants. Notwithstanding that argument, even if the AUMF somehow related to the type of detainment the President is exercising in this case, Congress clearly

defined the parameters of such detainment in the Patriot Act.

In the Patriot Act, Congress provided specific procedures to deal with enemy or terrorist aliens. This is in contrast to the AUMF, which does not mention detention at all. The Patriot Act confers broad authority on the Attorney General to detain any alien whom he reasonably believes to have engaged in terrorist activity or is likely to do so in the future, or has any affiliation with terrorist organizations. See Patriot Act § 412(a); 8 U.S.C. § 1182(a)(3)(A)-(B); 8 U.S.C. § 1227(a)(4)(A)(i), (a)(4)(A)(iii), (a)(4)(B). The Attorney General may take such a person into custody without process based solely on his reasonable belief that the person is affiliated with terrorism, with the only recourse being a petition for a writ of habeas corpus. See Patriot Act § 412(a); 8 U.S.C. § 1226a(b)(1).

In granting such unprecedented powers to the Attorney General, Congress also strictly limited the duration such persons could be held within the United States. For example, the Attorney General must begin "removal proceedings" or "charge the alien with a criminal offense, not later than 7 days after the commencement of such detention." See 8 U.S.C. § 1126a(a)(5). In fact, the

Patriot Act *explicitly* prohibits the kind of indefinite detention of terrorist or enemy aliens of the kind the President seeks to invoke in this case. See 8 U.S.C. § 1226a(a)(6) ("Limitation on Indefinite Detention" - allowing additional detainment "for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.") (emphasis added).

The government's claim of inherent constitutional power to indefinitely detain Ahmed is incorrect and in direct contradiction with the plain text of the Patriot Act. Under the *Youngstown* framework, the President's actions in this case are "incompatible with the expressed . . . will of Congress," where "his power is at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

The plurality below attempted to circumvent this problem by arguing that the Patriot Act deals with the President's power under Article II § 3, to "take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3, and that the AUMF deals with "the President's separate Commander-in-Chief power." See *Ahmed v. United States*, No. 08-11144 at 18, n.2 (12th Cir. 2008). This argument fails for a number of reasons.

First, and most importantly, this Court has never held that the President may use his war powers to detain civilians. See *United States ex rel Toth v. Quarles*, 350 U.S. at 14 (“[A]ssertion of military authority over civilians cannot rest on the President’s power as commander-in-chief.”). The Court should not overturn this foundational principal of our constitutional government.

Second, keeping in mind that the AUMF does not even mention detainment, the plurality’s argument ignores the interpretive rule that the specific governs the general. See *Long Island Care at Home, Ltd. v. Coke*, 555 U.S. 158, 170 (2007). See also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”). The specific detainment procedures should govern any assertion of authority to detain civilians under the AUMF.

Finally, the plurality’s interpretative gloss on the Patriot Act would render its detainment provisions superfluous in light of the unlimited power the President has to detain under its reading of the AUMF. “When two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional

intention to the contrary, to regard each as effective.”
See Vimar Seguros y Reaseguros, S.A. v. MV Sky Reefer, 515 U.S. 528, 533 (1995) (internal quotations omitted) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). To hold that the President can indefinitely detain an enemy alien without reference to the procedures established in the Patriot Act would render those procedures superfluous and ineffective. This Court should adopt an interpretation that gives both the AUMF and the Patriot Act full effect - namely, that the AUMF pertains strictly to enemy combatants as that term has been traditionally defined and that the Patriot Act applies to civilian-aliens accused of terrorism-related activity.

The President may not indefinitely detain Ahmed under the AUMF, because Ahmed is a civilian and the AUMF applies only to enemy combatants. Nor may the President indefinitely detain Ahmed based on any inherent constitutional power because Congress has explicitly limited the President’s ability to indefinitely detain alleged enemy or terrorist aliens such as Ahmed, and the President has never been able to detain civilians based on his war powers. This Court should end the illegal detention of Ahmed and order the President to either charge

him with a crime, deport him pursuant to the Patriot Act, or release him.

II. PETITIONER AHMED WAS NOT GIVEN ADEQUATE PROCEDURE TO CHALLENGE HIS DESIGNATION AS AN ENEMY COMBATANT.

Ahmed is a lawful United States resident and is thus is entitled to the protections of the Due Process Clause. The Fifth Amendment protects all persons, not just United States citizens, and lawful presence in this country extends these rights to legal residents. See U.S. CONST. amend. V; *Johnson v. Eisenstrager*, 339 U.S. 763, 770-71 (1950).

The Court uses a balancing test to determine the process required in individual cases: the court must weigh the private interest at stake versus the public interest and the cost of additional procedural safeguards, while paying great heed to any enhanced accuracy more safeguards would provide. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). Five years ago this Court applied that test to determine what process is due to those who have taken up arms against the United States abroad. See *Hamdi v. Rumsfeld*, 524 U.S. 507 (2004). Today, this Court must reapply the test to determine what process is due to a legal United States resident, arrested by civilian law enforcement, and subsequently labeled an enemy combatant

and imprisoned with no date of release. Balancing the interests at stake in Ahmed's case makes it clear that he did not receive due process.

A. The Private Interest At Stake, Freedom From Imprisonment, Outweighs The Minimal Public Cost Of Requiring Additional Procedural Protections.

The government seeks to deprive Ahmed of a fundamental interest: his freedom. Due process is the primary protection our Constitution affords those who face deprivation of liberty. The Court of Appeals for the Twelfth Circuit correctly balanced the individual interest at stake against the public safety interest, to determine that more safeguards are constitutionally mandated before Ahmed's liberty can be taken.

Freedom from detention, even temporary, has long been considered an elemental liberty interest. *See Hamdi*, 524 U.S. at 529. Ahmed has been subjected to indefinite detention, without formal charge or trial. In today's "war on terror," unlike in past conventional wars, holding individuals until the cessation of hostilities could mean unjustified detention that may last years or even decades, a risk that is too significant to ignore. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2270 (2008).

Undoubtedly, the government's interest in protecting national security and preventing enemy soldiers from

returning to the battlefield is also great. However, under the circumstances of this case, that interest does not outweigh the need for procedures that will adequately protect the individual liberties at stake. The *Hamdi* Court noted that even in a time of conflict the *Mathews* balancing test still applies, and the weight of the factors is not upset by circumstances of war. See *Hamdi*, 524 U.S. at 530. The fundamental purpose of the writ of habeas corpus - to allow courts to act as a meaningful check against unjust intrusion upon individual rights - safeguards individual liberty even during wartime. See *id.* at 535. It would "indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties which makes the defense of the nation worthwhile." *Id.* at 533.

Affording Ahmed the procedural safeguards necessary to minimize the possibility of an erroneous indefinite detention neither diminishes the public interest at issue nor places an unacceptable burden on government. In *Hamdi*, when the Court weighed the private interests against the public cost, it found that the circumstances of the petitioner's capture, which had occurred on a foreign battlefield, warranted reduced procedural protections. See *Hamdi*, 524 U.S. at 534-35. The Court noted that ordering

the government to produce evidence “buried in the rubbles of war” and requiring military personnel located half a world away, to testify, would place an undue burden on the ability of the armed forces to concentrate on the task at hand, as opposed to the threat of litigation at home. See *id.* at 532, 534.

However, in Ahmed’s case, the balance of the interests cuts the opposite way. Affording Ahmed a meaningful opportunity to challenge his detention will not unduly burden the government. Unlike the petitioner in *Hamdi*, Ahmed was not captured on a foreign battlefield, but was arrested while lawfully residing in the United States. Because he was originally indicted for domestic crimes, most of the evidence against him is neither buried under the rubbles of war, nor located half a world away, but rather was obtained domestically and is easily accessible. It is also possible that some of it, as Ahmed asserted in the criminal case, was obtained by torture. See *Ahmed v. United States*, No. 08-11144 at 7 (12th Cir. 2008)

The government should have to disclose the sources of its evidence against Ahmed. The Murphy Declaration, which sets out the government’s allegations against Ahmed, relies heavily on domestic evidence. See *Murphy Aff. Ex. A*. For example, the affidavit alleges that Ahmed was absent from

and failing veterinary school. See *id.* ¶ 8. It alleges that Ahmed's laptop contained incriminating material such as hacking programs and chemical weapon plans. See *id.* ¶¶ 12-15. Finally, there are allegations of social security fraud. See *id.* ¶¶ 17-18. All of this evidence was obtained domestically and does not differ from evidence that is routinely used in ordinary criminal prosecutions. The district court overlooked this important distinction between *Hamdi* and the case at bar. This distinction merits greater procedural safeguards and evidentiary standards in this case.

It is true that some of the evidence against Ahmed may be sensitive in nature. However, sensitive information can be reviewed in a manner that will enhance the fairness of the proceeding without harmful consequences to government interests. In the course of such a review the government can explain why its evidentiary sources must remain protected, and the court can then determine whether the government presented a valid reason for withholding this information from the defense. See *Parhat v. Gates*, 532 F.3d 834, 849 (D.C.Cir. 2008). But, a mere generic explanation that the information is "law enforcement sensitive," like the one given in Ahmed's case, should not suffice. See *id.* at 836. It is the courts, not the

executive, which have discretion to seal records and to determine whether protected evidence must be available to defense counsel even if withheld from the public. See *id.* at 853. At the very least, to permit assessment of information while still protecting its sensitive source, the court may conduct an *in camera* review of the evidence. See *id.* at 849. Courts must retain discretion to formulate procedures which accommodate competing interests, and in doing so, recognize that "security subsists in fidelity to freedom's first principle." See *Boumediene*, 128 S.Ct. at 2277.

In sum, the government utterly fails to show how producing seemingly ordinary domestic evidence, or confidentially presenting more sensitive information, could intrude upon the executive's ability to effectively ensure national security. Ahmed's fundamental interest in having a meaningful opportunity to defend himself outweighs any unknown and unexplained government interest in protecting evidentiary sources. At the very least, the government must be required to show why, despite the individual rights at stake, procedural safeguards that would give Ahmed a meaningful opportunity to challenge his detention cannot be granted.

B. The Process By Which Ahmed Was Deprived Of His Liberty Created An Unacceptable Risk Of Error.

The government alleges that Ahmed is an enemy combatant and that this designation authorizes indefinite detention. See *Ahmed*, No. 08-11144 at 7-8. The stakes for Ahmed are comparable to if not higher than those for many criminal defendants. However, he did not receive any of the benefits given to all who must stand trial, including, among many other important rights, the presumption of innocence. Instead, to justify this detention, the government was only required to produce "credible evidence" supporting Ahmed's status as an enemy combatant. Then the burden shifted to Ahmed to prove his own innocence with "more persuasive" evidence. *Id.* at 9. But, with little knowledge of the sources of the evidence against him, Ahmed would not, in actuality, be able to contest it.

1. Greater procedural safeguards are required here than those provided in prior cases.

a. Because the evidence against Ahmed is less persuasive and readily available, more procedure is necessary to reduce the risk of error.

The evidence against Ahmed is far less incriminating than that which the court considered in *Hamdi*. In *Hamdi*, the Court noted that because the petitioner was captured on the battlefield, caught in an extremely incriminating and virtually indisputable action, additional procedural

safeguards were of questionable value. See *Hamdi*, 524 U.S. at 534. Accordingly, the Court allowed the use of hearsay evidence to support Hamdi's detention because of the higher burden that requiring production of first-hand evidence would place on government. See *id.* at 529. The Court was careful to point out that while hearsay "may" be the most reliable evidence available, the procedures should be tailored to match the specific factual circumstances of each case. See *id.* Thus, the 12th Circuit correctly decided that Ahmed is entitled to a more probing inquiry than Hamdi.

In Ahmed's case, not only are the circumstances of his capture less incriminating, but first-hand evidence can more easily be produced. Ahmed was captured not on a battlefield, but was arrested while lawfully residing in the United States. See *Ahmed*, No. 08-11144 at 7. These facts distinguish this case not only from *Hamdi*, but also from *Padilla v. Rumsfeld*. See 423 F.3d 386 (4th Cir. 2004). In *Padilla*, although the petitioner was captured in the United States, the parties had stipulated that he had fought in Afghanistan, thus the Court found that the location of his capture was not controlling, and that additional procedures were not likely to have significant value. See *id.* at 390.

In contrast to *Hamdi* or *Padilla*, here additional procedures are of unquestionable value. The possibility that law enforcement picked up an innocent man is significant, as unlike Hamdi and Padilla, Ahmed was far from being caught 'red-handed.' Indeed, Ahmed could be nothing more than an ordinary immigrant. The government offers only circumstantial and hearsay evidence, such as Ahmed's failing status and consistent absences from school, without, as far as the record indicates, ever investigating alternative explanations for Ahmed's poor academic performance. See *Murphy Aff. Ex. A* ¶ 8. The government does offer some concrete accusations against Ahmed, but provides no indication as to the source of this information. Instead, the government asks the Court for unquestioned acceptance of the assertions. To do so, however, would require the Court to ignore the fundamental purpose of habeas corpus - to operate as a check on abusive and unjust detention - and this the Constitution will not allow.

b. Ahmed was not afforded the minimal procedures mandated by the Detainee Treatment Act of 2005, procedures which have since been held inadequate as a substitute for habeas corpus proceedings.

Following the *Hamdi* opinion, the Deputy Secretary of Defense created Combatant Status Review Tribunals (CSRT) as

a means to determine whether individuals should be labeled "enemy combatants." See *Boumediene*, 128 S. Ct. at 2241. The CSRT procedures entitled detainees to a personal representative who could explain the process and view classified evidence, to a summary of the evidence, and gave them the right to confront any witnesses against them. See *Boumediene*, 128 S.Ct. at 2288. In *Boumediene*, the Court determined that these procedures were inadequate to replace a habeas proceeding, and later that the Detainee Treatment Act of 2005, which disallowed habeas review of these cases, was unconstitutional. See 128 S.Ct. at 2240, 2288. Specifically the Court found that the CSRT procedures did not afford meaningful review, and thus the Court required a more thorough habeas corpus proceeding, while still managing to avoid placing an undue burden on government and military interests. See *id.* at 2276. As a result, this Court, noting that *Hamdi* is not controlling, has since required additional process on habeas review. See *id.* at 2269.

Ahmed was not even given the benefit of an initial military tribunal; he was designated as an enemy combatant upon the mere production of "credible evidence" by the government. Even the *Boumediene* dissent, which believed that the CRST proceedings did provide fair process, noted

that if the detainee received no initial review of an enemy combatant designation by a military tribunal, full habeas proceedings were needed. See *id.* at 2285 (Roberts, C.J., dissenting). While Ahmed was told that he would have sixty days to attempt to rebut the government's affidavit, he was given no meaningful chance to do so. With no access to the underlying evidence and no chance to confront the witnesses against him, his opportunity to rebut was nothing more than a futile formality.

The scope of habeas review depends in part on the rigor of and the due process provided by any earlier proceedings - what matters in a due process analysis is the sum of the procedural protections afforded to the detainee at all stages. See *id.* at 2269. When a person is detained simply because of an executive order, like Ahmed was, rather than after findings by a neutral tribunal, the need for detailed habeas corpus review is most pressing. See *id.*

2. Certain minimal procedures are required to allow Ahmed a meaningful opportunity to defend himself.

The right to seek a writ of habeas corpus has long been interpreted as requiring both a functional and a meaningful review of the previous determination. See *Boumediene*, 128 S.Ct. at 2241-47. Detainees filing a habeas writ must be given a worthwhile chance to

demonstrate that they are being held erroneously, and the reviewing court must fashion procedures to afford this opportunity. See *id.* at 2266. Review does not just consider the power of the executive to detain, but must also examine the adequacy of the cause for detention. See *id.* at 2269. Ahmed was given neither a functional nor meaningful review.

Courts have found a number of problems inherent in the proceedings used to designate detainees as enemy combatants, problems that also raise the risk of error in Ahmed's case. These include the fact that the proceedings are accusatorial and that unsupported hearsay documents, with nothing to show their reliability, are used against detainees. See *id.* See also *Parhat*, 532 F.3d 834. Ahmed has been labeled an enemy combatant in a proceeding in which all the government had to do was produce "credible" evidence supporting his designation, and in which this "credible" evidence consisted entirely of unsupported hearsay that cannot be assessed for reliability.

The combination of the lack of opportunity to assess the reliability of evidence, and the shifted burden of proof which required Ahmed to rebut the presumption against him rendered the proceeding a mere formality. When the reliability of government evidence cannot be contested, the

presumption becomes that the evidence is genuine, a presumption that becomes virtually irrefutable when petitioner has no ability to attack the factual assertions. See *Parhat*, 532 F.3d at 847.

Recognizing these problems, courts have begun placing a greater burden on the government to support enemy combatant designations. Courts have recognized that a label as an enemy combatant must be based on evidence that a court can access for reliability. See *id.* at 836. A reviewing court must be afforded full authority to examine the sufficiency of the government's evidence. See *Boumediene*, 128 S.Ct. at 2270. Otherwise, the court's role to engage in careful review of the record is diminished. See *Parhat*, 532 F.3d at 850. Hearsay, in particular, must be presented in a form that allows a court to assess its reliability, and government affidavits cannot be merely accepted as if they were fact. See *id.* at 849-50.

The D.C. Circuit recently held that counsel for the detainees must be provided access to as much of the classified evidence as is practical, so as to enable counsel to argue and the court determine, whether a preponderance of the evidence supports the designation as an enemy combatant. See *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007). Additionally, in *Parhat*, the D.C.

Circuit noted that the government must prove three things *by a preponderance of the evidence* in order to label an individual an enemy combatant: (1) that the individual was a part of enemy forces; (2) that those forces are associated with al Qaeda or the Taliban; and (3) that those forces engaged in hostilities with the United States or its coalition partners. See 532 F.3d at 843. It is clear that this Court as well as other courts of appeals have adopted the view that indefinite imprisonment, based on mere suspicion, is no longer an available option of treatment for those accused of aiding the enemy. See *Boumediene*, 128 S.Ct. at 2262 (citing *Hamdi* U.S. at 564 (Scalia, J., dissenting)).

Even against the backdrop of this clear trend, the district court afforded only the barest procedural safeguards to Ahmed. The court did not require the government to prove anything and the procedures afforded did not provide any access to the relevant evidence and its sources, making a reliability inquiry impossible.¹

In conclusion, the process laid down by the district court does not provide Ahmed an opportunity to meaningfully challenge his designation as an enemy combatant. To allow

¹In this case, a meaningful reliability inquiry should also investigate whether some evidence was obtained by torture as Ahmed alleges. See *Ahmed*, No. 08-11144 at 7.

the government to indefinitely detain a lawful United States resident arrested on United States soil based on nothing more than an executive hearsay document, could have immensely far-reaching effects. There would be little to stop the use of this method to detain anyone in the United States without charge or trial. As the dissent noted in *Hamdi*, such a ruling would mean that every citizen, based on a perceived need to protect national security, could be exposed to deprivation of liberty from an exercise of military power. See *Hamdi*, 542 U.S. at 560 (Scalia, J., dissenting).

In our society, in which liberty and freedom against arbitrary and tyrannical government intrusion are highly valued, such an alarming possibility cannot be one we are willing to accept.

CONCLUSION

Petitioner respectfully requests that the judgment of the Court of Appeals should be reversed as to the first issue of presidential authority, and either affirmed, or modified for more process, as to the second issue of due process.