

No. 08-11144

IN THE
Supreme Court of the United States

BURHAN UDDIN AHMED,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT.

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

BRIEF FOR PETITIONER

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Questions Presented

- I. Whether the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorizes—and if so does the Constitution allow—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on a determination that the detainee conspired with al Qaeda to engage in terrorist activities?

- II. 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 sitting en banc (R. at 5-48) is not reported. The panel opinion (R. at 5) is not reported. The district court opinions (R. at 5) are not reported. The magistrate judge's final report and recommendation (R. at 9) is not reported.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the en banc court of appeals was entered on November 24, 2008. The petitions for writs of certiorari filed by Burhan Uddin Ahmed and the United States of America were granted on October 2, 2009.

Constitutional and Statutory Provisions Involved

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title.

This joint resolution may be cited as the "Authorization for Use of Military Force".

Section 2. Authorization for Use of the United States Armed Forces.

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

(b) War Powers Resolution Requirements.

(1) Specific Statutory Authorization. Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of Other Requirements. Nothing in this resolution supersedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

Statement of the Case

Petitioner's Arrest and Criminal Prosecution

Petitioner Burhan Uddin Ahmed came to the United States with his family to pursue a doctor of veterinary medicine degree at Wilson University in Wilson, East Dakota. (R. at 7) Four months later he was arrested and charged with the "possession of counterfeit Social Security cards with the intent to defraud" and with "making a false statement to the FBI." (*Id.*) Petitioner pled not guilty to all charges, and the district court set a date for trial on July 17, 2003. (*Id.*) The court also scheduled a hearing on pretrial motions, including a "motion to suppress evidence that Ahmed asserted was obtained by torture." (*Id.*)

However, the court never heard that motion, and the Petitioner never received his day in court before a jury of his peers. Instead, just one month before trial, through the stroke of a pen, the President changed Petitioner's status from criminal defendant to enemy combatant.¹ (*Id.*) As a result, the

¹ In particular, the President directed the Secretary of Defense to "detain him as an enemy combatant," and the court granted this request. (*Id.* at 7-8) The President's order stated in detail that he had "DETERMINED for the United States of America that" Petitioner:

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

charges were dismissed, the proceedings were halted, and for the past seven years Petitioner has been held without charge under military custody. (*Id.* at 7-8) Petitioner's detention remains indefinite, and the government has given him no indication of when charges may be filed. (*Id.*)

Petitioner's Habeas Petition and Hearing

After being transferred to military custody, Petitioner filed a petition for a writ of habeas corpus. (*Id.* at 8) In his petition he argued that his detention "as an enemy combatant was unlawful and that the government must either file criminal charges against him or release him." (*Id.*) In the alternative, "the petition argued that Ahmed must be afforded a hearing to challenge the factual basis for his designation as an enemy combatant." (*Id.*) In response, the government argued that the President had authority both under the AUMF and "inherent constitutional authority to indefinitely detain Ahmed." (*Id.*) In addition, the government "assert[ed] that Ahmed was given adequate process to challenge his detention." (*Id.*) The district court sided with the government, holding that the Petitioner could be detained as an enemy combatant. (*Id.*)

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.* at 7)

However, the district court also sent the case to a magistrate judge to determine the Petitioner's procedural due process rights. (*Id.* at 9) The magistrate judge rejected Petitioner's argument that "he had a right to procedural safeguards substantially equivalent to those criminal defendants receive." (*Id.*) Instead, the judge determined that the government only needed to provide Petitioner "with notice of the factual basis of his detention, and that if the government could produce credible evidence supporting his designation as an enemy combatant, the burden would shift to Ahmed to refute this designation with more persuasive evidence." (*Id.*) The magistrate judge concluded that there was credible evidence to support Petitioner's detention as an enemy combatant. However, the sole support for his decision came from a hearsay document, the Declaration of John R. Murphy ("Murphy Declaration"), who was a government agent.² (*Id.*) The judge then shifted the burden to Petitioner to prove his innocence, giving him 60 days to find more persuasive evidence to refute this hearsay document. (*Id.*)

In response, Petitioner generally denied that he was an enemy combatant and refused to offer any evidence to rebut the

² The Murphy Declaration alleged: that the Petitioner was an operative of al Qaeda camp in Afghanistan; that he had communicated with Osama Bin Laden and was aided by other known high-ranking members of al Qaeda; that he entered the United States with the intent to commit terrorist attacks within the country; and that he possesses highly valuable intelligence about al Qaeda. (*Id.* at 8-9)

Murphy Declaration. (*Id.*) In support, Petitioner argued "that the procedures adopted by the magistrate judge were unconstitutional, and that he should not be forced to prove his own innocence." (*Id.* at 10) The magistrate judge rejected the Petitioner's arguments and recommended dismissal of the case, which the district court granted. (*Id.*)

Summary of Argument

For almost seven years, the military has detained Petitioner without charge or trial in violation of basic procedural protections established by the Constitution. In particular, his detention violated the Constitution for three reasons. *First*, under the AUMF, Congress has not *clearly* authorized the indefinite, and potentially lifelong, detention of Petitioner for two reasons. For one, under longstanding principles of war, the Petitioner does not meet the definition of an enemy combatant—someone who is captured while aiding the enemy on the battlefield. Also, the Patriot Act, not the AUMF, addresses procedural requirements for the detention of domestic terrorists, and it does not allow for indefinite detention.

Second, even if Congress authorized Petitioner's military detention under the AUMF, it would be overstepping important boundaries set by the Constitution that protect civilians from military encroachments. In particular, this division maintains that civilians who are not enemy combatants may not be held

indefinitely or tried by military commission, unless the civil courts are closed or inoperative. This carefully limited exception does not apply in this case, because the courts of East Dakota are open and functioning. Moreover, the President's inherent powers as Commander-in-Chief have never permitted the president to disregard this historic division by turning the entire country into a warzone, especially where the President, as in this case, lacks congressional authorization to do so.

And *third*, even if the AUMF authorizes and the Constitution permits the Petitioner's indefinite military detention, the district court did not provide Petitioner constitutionally sufficient process to challenge his designation as an enemy combatant. The additional safeguards and procedures suggested by the Supreme Court in *Hamdi v. Rumsfeld* are not automatic and mandatory to every enemy combatant proceeding, but were nonetheless applied to the Petitioner without question. The magistrate judge did not weigh the competing interests, burdens and circumstances of the Petitioner and the government before accepting the hearsay document and creating the proceedings for Petitioner's response. Also, the location of Petitioner's arrest demands more due process than was given.

Argument

The Founders established certain rights to criminal process. See, e.g., U.S. Const. art. I, § 9, cl. 2; *id.* art. III, § 2, cl. 3; *id.* amends. IV, V, and VI. These rights reveal the Framers' "general mistrust of military power permanently at the Executive's disposal," as well as their intent to restrict the potentially dangerous and democratically destructive power of the military in civilian affairs. *Hamdi v. Rumsfeld*, 542 U.S. 507, 568 (2004) (Scalia, J., dissenting). Accordingly, "[i]n our society liberty is the norm," and detention without trial "is the carefully limited exception.'" *Hamdi*, 542 U.S. at 529 (plurality opinion) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). That limited exception has been wrongfully applied in this case for three alternative reasons: (1) the AUMF does not clearly authorize Petitioner's indefinite military detention (2) even if the AUMF authorizes it, the Constitution does not permit it (3) even if the AUMF authorizes and the Constitution permits it, the district court did not afford the Petitioner with adequate process to challenge his designation as an enemy combatant.

I. THE AUMF DOES NOT AUTHORIZE PETITIONER'S INDEFINITE DETENTION.

A. Congress Must Give *Clear* Authorization for the Suspension of Constitutional Procedural Protections.

Any congressional or executive branch departures from the procedural protections provided in the Constitution, such as those denied to the Petitioner in this case—for instance, the right to a jury trial—require a *clear* authorization from Congress. See *Ex parte Endo*, 323 U.S. 283, 299–300 (1944) (explaining that congressional or executive authorizations that imply the suspension of constitutional protections must be “clearly and unmistakably indicated by the language they used”). The concern for clear authorization is magnified in cases such as this one, because there is a real chance that detention may be potentially permanent due the prolonged nature of the “war on terror.” see also *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2270 (2008) (cautioning that detention in a war on terror “may last a generation or more”). Accordingly, authorization for prolonged and possibly lifelong detention without charge cannot be implied from congressional silence. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 699–701 (2001) (refusing to construe a statute authorizing some detention of allegedly dangerous aliens to authorize indefinite detention).

Moreover, this Court has repeatedly required a clear statement from Congress, even when the country is at war. The

Court used this approach during the Civil War and World War II. See, e.g., *Ex parte Milligan*, 71 U.S. 2, 119-120 (1866) (explaining that Article III's jury trial clause and the Fourth, Fifth, and Sixth Amendments apply to the president during war as well as during peace); see also, *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (adhering to this approach as indicated by its emphasis that Congress had "explicitly provided" for the WWII prisoners trial by military commission); accord *Hamdan*, 548 U.S. 557, 592 (2006) (stating that *Quirin* was based on clear authorization from Congress). Likewise, in addressing a similar issue during the current war on terror, the Court once again affirmed the clear authorization requirement in *Hamdi*. Although the *Hamdi* plurality recognized that the AUMF did not specifically mention detention, it explained that the military detention of an armed soldier captured on a foreign battlefield was so "fundamental [an] incident of waging war" that "in permitting the use of 'necessary and appropriate force,'" Congress had "*clearly and unmistakably*" authorized detention. *Id.* at 519 (emphasis added).

B. The AUMF Does Not Clearly Authorize the Military to Indefinitely Detain Civilians Who Reside in the United States and Have Never Taken Up Arms in the Conflict.

Applying the clear statement requirement to this case, the AUMF does not clearly and unmistakably authorize Petitioner's detention for two primary reasons. *First*, interpreted in light of longstanding war principles established by this Court's

precedent, the AUMF's authorization to use "necessary and appropriate force" does not clearly authorize the military to detain legal residents of the United States who are seized far from the armed conflict in Afghanistan and who have never taken up arms in the conflict. *Second*, the Patriot Act, not the AUMF, provides the framework for the detention of persons within the United States suspected of terrorist activities, and the Patriot Act does not permit indefinite military detention.

1. In light of longstanding war principles, the AUMF does not permit indefinite military detention of Petitioner as an enemy combatant.

The AUMF authorized the use of "necessary and appropriate force" against "nations, organizations, or persons" responsible for the attacks of September 11. AUMF, § 2(b), 115 Stat. 224. Within a week of the AUMF authorization, the President determined that the al Qaeda and Taliban organizations were responsible for the attacks, and subsequently directed troops to Afghanistan. *See Hamdan*, 548 U.S. at 568 (explaining that the President's authorization under the AUMF targeted al-Qaeda and the Taliban who were located in Afghanistan); *accord Hamdi*, 542 U.S. at 510 (plurality opinion).

Although the AUMF clearly authorized the use of force in Afghanistan against those persons responsible for the September 11 attacks, the AUMF does not clearly authorize the detention of any person in any place that is suspected of conspiring with

these enemy forces. It does not grant the President the power to turn the United States into a battlefield, subjecting local and state governments, courts and the country, to military rule. But that is what has happened in this case. At the time of his detention, Petitioner was a student in East Dakota, far from the conflict being waged in Afghanistan, and never a participant in that conflict. (*Id.* at 7) By detaining the Petitioner in military barracks and without charge or trial for seven years, and for potentially the remainder of his life, the President has effectively turned our country into a battlefield. (R. at 6-8)

Even more disconcerting, the government's sole evidence for this unprecedented and potentially lifelong detention is a hearsay report that alleges Petitioner was conspiring with enemy forces to bring harm to the United States. (*Id.*) Nevertheless, the Twelfth Circuit held that the AUMF authorized the government to detain Petitioner.

The Twelfth Circuit's holding dramatically misunderstands the longstanding principles of war defining enemy combatants that this Court has upheld. (R. at 13-16) In *Hamdi*, the plurality held that the AUMF's authorization to use "necessary and appropriate force" permitted the military to detain indefinitely *enemy combatants*, which it defined as those detained on the battlefield in Afghanistan while aiding the enemy. *Id.* at 519. The detainee in *Hamdi* fit this traditional

definition of enemy combatant perfectly. He "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and...engaged in an armed conflict against the United States' there." *Id.* at 516 (citations omitted). Accordingly, the court found that the AUMF clearly authorized his detention. *Id.* at 519.

Contrary to the result reached by the Twelfth Circuit, the plurality's decision in *Hamdi* does not mean that Congress also intended to grant the President power to sidestep the civilian justice system by turning a criminal defendant into an enemy combatant, such as happened to the Petitioner. Indeed, this very notion overlooks the plurality's limited definition of an enemy combatant. In fact, the plurality distinguished precisely between those who were enemy combatants and civilians such as Petitioner, who was detained not while taking up arms on the battlefield, but while unarmed and in his home far from the battlefield.

In particular, the plurality rests this distinction on the longstanding precedent of *Ex parte Milligan*, where the Court refused to permit President Lincoln from militarily detaining and trying Lambdin Milligan. 71 U.S. 2 (1866); *Hamdi*, at 521-522. Distinguishing *Milligan* from *Hamdi*, the plurality notes that "[i]n that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had

jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there." *Id.* ("That fact was central to its conclusion."). Emphasizing this distinction, the plurality deduced that "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Id.* at 522. Unlike Milligan, the plurality reasoned, Hamdi was captured on the battlefield while carrying a weapon. *Id.* Because of this crucial difference, it held Hamdi could be held as enemy combatant, while Milligan could not. *Id.*

Like Milligan, Petitioner was detained away from the battlefield and had never taken up arms. (R. at 7) Moreover, just as Milligan was accused of plotting grave acts against the United States, so also Petitioner was accused of conspiring with enemies to bring great danger to the United States. (R. at 7-8) Moreover, unlike Hamdi, the Petitioner was not detained while carrying a rifle on the Afghan battlefield. In sum, Petitioner is clearly more like Milligan than Hamdi, and thus should be tried in civilian courts, just as the Court required in *Milligan*.

2. The Patriot Act indicates that Congress denied the President the power to authorize the indefinite domestic detention of terrorist suspects.

While the AUMF is silent as to those detained in the United States who are suspected of terrorist activities, Congress has spoken. After Congress passed the AUMF, it began consideration of another statute, the Patriot Act, which explicitly addresses the domestic detention of alien terrorist suspects. See *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 (the "Patriot Act"). The Patriot Act even addresses the process required when detaining a person who enters the United States to engage in terrorist acts. See Patriot Act § 412. Unlike the broad and indefinite detention that the government argues for, the Patriot Act mandates that the Attorney General must either "charge" the detainee or initiate "removal proceedings" within seven days of their detention. Patriot Act § 412(a).

When the Patriot Act was being debated in Congress, the administration initially sought indefinite detention without charge, just as the United States seeks in this case under the guise of the AUMF, but it was resisted by members of Congress as unconstitutional. See, e.g., *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 18, 26, 28 (2001); *Administration's Draft Anti-Terrorism Act of 2001: Hearings*

Before the H. Comm. on the Judiciary, 107th Cong. 21, 40, 54 (2001). This opposition resulted in a limitation to seven days of detention without charge. See Patriot Act § 412(a); see also 147 Cong. Rec. S10, 561 (daily ed. Oct. 11, 2001) (statement of Sen. Hatch) (relating that "Senator Kennedy, Senator Kyl, and I worked out a compromise that limits the [detention] provision").

The fact that Congress discussed the issue of indefinite detention and even opposed the President's position supports the conclusion that Congress did not intend in the AUMF, passed just weeks earlier, to grant the President the authorization he now seeks. See, e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972) (later enactments are "entitled to great weight in resolving any ambiguities and doubts" (internal quotation marks and citation omitted)). Or at the very least, in light of this discussion, it cannot be said that Congress clearly authorized what the government and the Twelfth Circuit contend.

In fact, the inverse is true. The AUMF, interpreted in light of the Patriot Act and longstanding principles of war, demonstrates that Congress clearly refused the power of indefinite domestic detention that the Twelfth Circuit concluded was granted in the AUMF. The AUMF was concerned not with domestic terrorism, but with the use of the military force abroad, in Afghanistan, where the individuals responsible for the September 11 attacks were located. See AUMF § 2(b) (citing

the War Powers Resolution); *Hamdan*, 548 U.S. at 568; *Hamdi*, 542 U.S. at 510 (plurality opinion).

II. THE CONSTITUTION PROHIBITS PETITIONER'S INDEFINITE DETENTION.

As discussed above, in light of longstanding principles of war and the Patriot Act, the Petitioner's detention was not authorized by the AUMF. However, even if the AUMF was intended to permit domestic detention of terrorist suspects, longstanding constitutional principles do not permit such authorization. Such principles became explicit during the Civil War, when the Court refused President Lincoln's request for military jurisdiction over a civilian who was conspiring to bring great danger to the United States. Under that longstanding precedent, the president cannot militarily detain civilians, such as Petitioner, without charge as long as the civil courts are open or functioning. This is especially true where Congress has provided no clear authorization for such an unprecedented expansion of the Commander-in-Chief's authority.

A. Constitution allows domestic military detention only when civil courts are not open or functioning.

The relevant legal principles governing the military's domestic detention were established by this Court in *Milligan*. The *Milligan* case involved Lambdin Milligan, who was part of a secret conspiracy group that President Lincoln alleged was conspiring to take military action against the government during

the Civil War. *Id.* at 16-17. The government argued that President Lincoln, as Commander-in-Chief, had power to militarily detain and try Milligan. *Id.* However, a unanimous court rejected this argument, though the justices differed on their reasoning. The majority held that Lincoln could not militarily detain Milligan under the Constitution.

In particular, the majority explained that Lincoln's power as Commander-in-Chief did not extend to the military detention of a civilian residing in the United States and suspected of committing an "enormous crime" in a "period of war" by conspiring with a military organization to overthrow the government. *Id.* at 6-7, 130 (emphasis in original). In support, the court reasoned that the law of war could "never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* at 121-122; see also *Hamdi*, 542 U.S. at 522 (plurality opinion) (reaffirming *Milligan*); *id.* at 567-568 (Scalia, J., dissenting) (same); accord *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) ("civilians[] are entitled to . . . the benefit of [the] safeguards afforded those tried in the regular courts authorized by Article III of the Constitution"). The Court further stated that "[i]f in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana." *Id.* at 131. Thus, it

concluded that the military could no longer detain Milligan.
Id.

Milligan is squarely on point for this case, as already discussed above in relation to whether the AUMF authorized Petitioner's detention. However, it is also on point for the majority's constitutional ruling that limits the President's power to militarily detain and try civilians. The courts of East Dakota are still open and functioning, just as the courts of Indiana were in *Milligan*. Moreover, like *Milligan*, the Petitioner had not yet taken up arms in the ongoing war in Afghanistan; he was merely conspiring with the enemy in terrorist plots. (R. at 7) Therefore, in accord with *Milligan*, Petitioner should have been held and tried as a civilian. Instead, for seven years he has been held without charge.

The Twelfth Circuit disagrees with this understanding of *Milligan*, and it points to *Quirin* and *Hamdi* as support for Petitioner's military detention as being constitutionally permissible. (R. at 15-16) However, both decisions are distinguishable in important ways. First, the *Quirin* opinion "represents the high-water mark" of military jurisdiction within the United States, and it has been severely criticized by the Court. *Hamdan*, 548 U.S. at 597 (Stevens, J., concurring); see also *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) ("[*Quirin*]

was not this Court's finest hour."). Nevertheless, *Quirin* can be read as conforming to the constitutional rule of *Milligan*.

The *Quirin* opinion held simply that members of Germany's armed forces who invaded the United States could be tried by military commission for violating the laws of war, because as members of the armed forces they fell within the traditional category of enemy combatants detained while on the battlefield. *Quirin*, 317 U.S. at 21-22, 31 (noting that the soldiers came in uniform and by German submarines while carrying explosives); see also *id.* at 22 n.1 (noting that the Eastern Seaboard was a military defense zone). Importantly, the *Quirin* Court restricted its opinion to those particular facts, so as not to overrule or change the *Milligan* precedent or the historic division between military and civilian jurisdictions, of which it was clearly testing the boundaries. *Quirin*, 317 U.S. at 45-46. Following the opinion, the executive branch proved this historic division remained, as it pursued punishment in the criminal justice system for the members of the same conspiracy as the *Quirin* petitioners who were not members of the German armed forces. See *Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943).

Unlike in *Quirin*, in this case the government does not allege that Petitioner entered this country from the battlefield in Afghanistan or that he came as an armed soldier in uniform or

with weapons. (R. at 7-8) Rather, the record indicates that Petitioner came to the United States legally with his family to pursue doctoral studies, though he would later be suspected of conspiring with al Qaeda agents. (*Id.*) As such, Petitioner was more like the German spies whom the executive branch later pursued, because like them he entered as a legal civilian and was later found to be conspiring with the enemy. (*Id.*)

Also, contrary to the Twelfth Circuit's conclusions, the *Hamdi* Court reaffirmed *Milligan's* longstanding constitutional constraint on military jurisdiction to times and places where the federal courts are open and functioning. 542 U.S. at 518-521 (plurality opinion). Moreover, *Hamdi* emphasized that the military's jurisdiction was limited to those members of the enemy forces who had direct participation in hostilities on the battlefield, and not those whose participation was far from the battlefield. *Id.* at 522 ("Had *Milligan* been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different."). The *Hamdi* plurality makes clear that the most important fact distinguishing *Milligan* from *Hamdi* is that *Milligan* was not detained while taking up arms on a battlefield on behalf of enemy forces, while *Hamdi* was. *Hamdi*, 542 U.S. at 522. And that is also the same fact that distinguishes the Petitioner in this case from *Hamdi*.

B. The President Has No Inherent Power to Detain Petitioner Under the Commander-in-Chief Clause.

Petitioner also cannot lawfully be detained as an exercise of the president's inherent authority under the Commander-in-Chief Clause of Article II. The Twelfth Circuit did not rest its opinion on the President's inherent authority, though it stated that the Commander-in-Chief power did not "undermine" its conclusion in light of the fact that the court believed that the AUMF authorized the Petitioner's detention. (R. at 17-18)

However, as argued above because the AUMF does not authorize Petitioner's detention the President's "power is at its lowest ebb" in this case. *Youngstown Tube & Sheet Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *Hamdan*, 548 U.S. at 638-639 (Kennedy, J., concurring). Moreover, the President's inherent powers as Commander-in-Chief do not provide him with authority to disregard the constitutional boundary between the operation of military jurisdiction and civilian courts. See, e.g., *Youngstown*, 343 U.S. at 643-644 (Jackson, J., concurring) ("[T]he Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.").

III. THE PETITIONER WAS NOT AFFORDED SUFFICIENT DUE PROCESS.

Finally, even if the AUMF authorizes and the Constitution permits Petitioner's detention, the Petitioner has not been afforded sufficient due process. The Petitioner has been physically detained by the United States for nearly seven years. He has been detained without opportunity to confront or cross-examine material witnesses, and without trial. The government has only presented evidence to a court that consists of disputed, unproven, and untested allegations of horrendous acts.

Freedom from physical detention is the most elemental of liberty interests, and has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. *Hamdi*, 542 U.S. at 529 (plurality opinion). The Twelfth Circuit recognized this interest had been violated when the magistrate judge improperly applied specific procedures recommended by the *Hamdi* plurality without first addressing the interests, circumstances and burdens of the parties. (R. at 26) The court also properly recognized that the procedures suggested by *Hamdi* are not automatic and mandatory for every enemy combatant proceeding. (R. at 25)

A. The Tailored Procedures, Presumptions, and Safeguards Suggested in *Hamdi* Were Not Meant To Be Applied in Every Enemy Combatant Proceeding.

In *Hamdi*, the Supreme Court was tasked with determining what process should be afforded to those seeking to challenge

their enemy combatant status. *Hamdi*, 534 U.S. at 507. As discussed above, Hamdi was a United States citizen who had been captured on an active battlefield in Afghanistan while armed. *Id.* at 508. In determining the necessary process, the Court first looked to the balancing test outlined in *Mathews v. Eldridge*. *Id.* (citations omitted). According to *Mathews*, the process due in any circumstance will be determined by "weighing the private interest that will be affected by the official action against the Government's asserted interest...and the burdens the Government would face in providing greater process." *Mathews v. Eldridge*, 424 U.S. 319, (1976).

The plurality in *Hamdi* weighed the interests in considering what may be appropriate for enemy combatant proceedings, and held that at a minimum those challenging their status were entitled to "notice of the factual basis for his classification... and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 534 U.S. at 533. But the court also suggested *possible* procedures and safeguards that could be used, such as a presumption in favor of the government, the possibility of allowing hearsay, and a burden-shifting scheme. *Id.* More specifically, the plurality *suggested* a streamlined procedure in which if the Government put forth "credible evidence that the habeas petition meets the enemy combatant criteria," then the "onus could shift to the

petitioner to rebut that evidence with more persuasive evidence that he falls out of that criteria." *Id.* at 534.

The *Hamdi* plurality did not state, nor imply, however, that normal procedures and safeguards would be lessened in every enemy combatant proceeding. *Hamdi* does not suggest that the burden-shifting scheme or acceptance of hearsay will be automatically adopted, noting that the "exigencies of the circumstances may demand that, aside from these core elements, proceedings may be tailored." *Id.* (emphasis added). Similarly, the Twelfth Circuit noted in its lower court opinion, that the burden-shifting framework was not intended to be a "hard and fast rule" but was rather a "mechanism to aid courts in balancing the interests of the parties, taking into account the unique facts of each case." (R. at 24) In a plurality opinion, the Fourth Circuit noted that such a balancing of interests will require "flexibility" by the courts in order to deal with a wide variety of circumstances and situations. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 255 (4th Cir. 2008) (plurality opinion), *vacated as moot*, 129 S.Ct. 1545 (2009).

The present case is one that requires such flexibility because of the circumstances of the Petitioner being arrested in the United States. *Hamdi* involved the capture of an armed enemy soldier, which is drastically different from the situation at hand—the Petitioner was arrested at his home in East Dakota,

surrounded by his family and civilians, and half a world away from a foreign battlefield. *Hamdi*, 542 U.S. at 510. The burden-shifting framework suggested by the Court could not have been intended to apply to such materially different factual circumstances. See *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) (to compare the battlefield seizure with a domestic arrest "is to compare apples and oranges").

If this Court had desired such relaxed proceedings, including the unquestioned admittance of hearsay, to be automatic in enemy combatant proceedings, then American citizens and aliens in this country could be at the mercy of their government. If these procedures were automatic, the government could justify seizing and militarily detaining any person not on an active battlefield simply by providing a hearsay document as evidence, even though the government's burden in producing more reliable evidence may be slight.

B. The Magistrate Judge Improperly Accepted the Burden-shifting Scheme and a Hearsay Document Without Considering the Circumstances, Competing Interests, and Burdens of Both Parties.

In the case at hand, the magistrate judge automatically accepted the burden-shifting scheme mentioned in *Hamdi* and a hearsay document as satisfying the Government's burden in that scheme. As previously discussed, these procedures were not meant

to be automatically adopted in every case. The magistrate judge did not consider whether the circumstances, interests, or burdens on the parties demanded different procedures.

As Petitioner was arrested in the United States, the circumstances here are entirely different from those of *Hamdi*. This requires a new evaluation of the interests, and burdens of Petitioner and the Government, in order to determine if process should be heightened and if hearsay is the most credible evidence available. As this was not considered, Petitioner's proceedings were unnecessarily tailored to lower standards in violation of Petitioner's right to due process.

1. The magistrate judge improperly accepted the hearsay document without first considering whether it was the most credible evidence available.

Upon appearing before the magistrate judge, the Government presented the Murphy Declaration, which contained the statements of a government official that summarized the national intelligence and other federal investigative information concerning the Petitioner. According to the declaration, the Petitioner was an Al Qaeda sleeper agent sent the United States to engage in and facilitate terrorist activities. The magistrate judge accepted this document without requiring any showing by the government that under the circumstances that the hearsay document was the most reliable evidence available from the government.

As previously mentioned, *Hamdi* does not automatically allow the use of hearsay. Hearsay may be accepted if the government can show that it will be burdened in providing greater process. *Hamdi*, 542 U.S. at 533. In *Hamdi*, the court considered the circumstances of a battlefield arrest and the burdens that would be imposed on the military in providing evidence and witnesses in the middle of an on-going conflict. *Id.* This situation made the use of hearsay acceptable. *Id.* But here, the government made no showing that it would be burdened in having to produce witnesses or evidence to avoid using hearsay.

In fact, the only evidence that the government presented was the hearsay document. At no point did the judge consider, nor did the Government offer, the availability of witnesses, whether evidence was confidential, or any other reason for why the hearsay document was necessary. But as the arrest occurred inside the United States, the evidence should be within domestic control and not "buried under the rubble" of war. *Al-Marri*, 534 F.3d at 245 (plurality opinion).

Furthermore, the burden of production must always fall on the party having sole or superior access to possession of critical evidence. See *United States v. Denver & Rio Grande R.R. Co.*, 191 U.S. 84, 92 (1903). Away from the battlefield, it is the government that knows why it has decided to arrest one individual from amongst millions of others, and the basis for

that arrest will be based upon facts that are uniquely within their possession and control. The Petitioner cannot meaningfully contest these allegations if he is not afforded the opportunity to challenge the veracity and credibility of those individuals on whose statements the allegations are based.

2. The magistrate judge failed to weigh the interests and burdens of the Government when deciding to lower the amount of process Petitioner received.

As previously discussed, the magistrate judge failed to consider the circumstances, interests, and burdens of both parties when determining the process the Petitioner was due. This court noted in *Hamdi* that in enemy combatant proceedings the Government may have important interests or experience significant burdens that may necessitate lower standards of due process. *Hamdi*, 542 U.S. at 530. These interests include national security, preventing the release of actual enemies of the state, and protecting military operations. *Id.* The court recognized potential burdens the government may face such as the practical difficulties in gathering evidence from a foreign battlefield, the confidentiality of military operations, and producing witnesses who are currently engaged in battle. *Id.*

But these are all burdens the Government would face if it were prosecuting a defendant that was captured on a battlefield—which is not the case at hand. The Petitioner's supposed activities are alleged to have mostly occurred in the United

States, which should make them more accessible in the records of the civilian officials who first investigated him. Activity that was alleged to have occurred in Afghanistan occurred before the September 11th attacks and the current war, meaning that witnesses are more likely to be available if they are not currently involved in military operations. The magistrate judge should have first evaluated the circumstances to see if such burdens were present. As the burdens here are lower than in the context involved in *Hamdi*, the burden-shifting scheme should not have been automatically adopted. As the Petitioner was denied such a consideration, his due process rights have been violated.

3. The magistrate judge also did not consider the interests and circumstances of the Petitioner.

The Petitioner's major interest in these proceedings is one held by every American citizen and resident alien—the right to be “free from physical detention by one's own government.” *Hamdi*, 542 U.S. at 529. This is the same interest as the petitioner in *Hamdi*, but the risk of erroneously depriving this interest is much higher in the present case, and should have been considered by the magistrate judge before determining the procedures to be adopted.

This risk is much higher due to the circumstances of the Petitioner's arrest. There is a much lower risk of misidentifying a civilian as a combatant during a battlefield

capture due to the battlefield context and signs of hostility. Persons found on a battlefield are, in all probability, combatants, whereas persons arrested in East Dakota are, in all probability, civilians. Away from the battlefield, the private interest of the Petitioner outweighs the burden of the government because individuals arrested in the United States are constitutionally presumed innocent until proven guilty, whereas combatants on a battlefield are subject to summary detention.

Furthermore, because of the circumstances of his arrest, the burdens placed on the Petitioner in the shifting scheme are significant. The Petitioner is at a disadvantage in that he is being asked to disprove a negative, rather than contest an allegation. He is being asked to prove that he never met with Osama bin Laden or attended an al Qaeda training camp. The government is in the best position to provide relevant evidence on this matter, but has only provided the Petitioner a list of allegations rather than sources of such information which would allow him to meaningfully contest the allegations. If the Petitioner was arrested on the battlefield he would be in a better position to prove that he was simply an "errant tourist, embedded journalist, or local aid worker. *Hamdi*, 542 U.S. at 534 (plurality opinion). As East Dakota has never been an active battlefield, the interests and burdens of the Petitioner are too significant to provide the Government with tailored proceedings.

The magistrate judge improperly ignored these interests in violation of the Petitioner's due process rights.

While this country has been forever changed by the face of terrorism, we cannot be continuously gripped by fear to the point we lose sight of the foundations of our Constitution. As Thomas Jefferson noted in his first Inaugural Address, the writ of habeas corpus is a major principle that has "guided our steps through an age of revolution and reformation...and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety." Thomas Jefferson, First Inaugural Address, March 4, 1801.

Conclusion

Because the President has no authorization under the AUMF or the Constitution to detain the Petitioner, the Twelfth Circuit's decision should be reversed. Alternatively, the Petitioner should be afforded sufficient due process in challenging the factual basis for his status as an enemy combatant, and the Twelfth Circuit's decision should be affirmed.

Dated: January 15, 2010

Respectfully Submitted,

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