

No. 08-11144

**IN THE
Supreme Court of the United States**

**BURHAN UDDIN AHMED,
PETITIONER,**

V.

**UNITED STATES OF AMERICA,
RESPONDENT.**

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT*

BRIEF FOR THE RESPONDENT

TEAM 1678

COUNSEL FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Congress has authorized the President to use "all necessary and appropriate" military force against organizations involved in the terrorist attacks of September 11, 2001 through the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF). Under the AUMF and the United States Constitution, is the President permitted to detain as an enemy combatant an individual who the government alleges is an active member of al Qaeda and who was lawfully residing in the United States at the time of his capture?

2. Was the process afforded by the district court to challenge a designation as an "enemy combatant" sufficient under the requirements of the Fifth Amendment?

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BRIEF FOR THE RESPONDENT**JURISDICTION**

The petition for a writ of certiorari was granted on October 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

On September 11, 2001, the al Qaeda terrorist network launched a devastating attack on the United States. Approximately 3,000 people were killed, including casualties in the World Trade Center buildings, the Pentagon, and on an airplane on course to strike a third target in Washington, DC. The scope of these attacks was unprecedented, not only among terrorist strikes but also in the entirety of American military history.

Congress responded swiftly. A week after the attacks, 98 Senators and 420 Representatives voted to "authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States." Pub. L. No. 107-40, 115 Stat. 224 (2001). Commonly referred to as the Authorization for Use of Military Force, or AUMF, the joint resolution authorized the President to use "all necessary and

appropriate force" to prevent the perpetrators of September 11 from striking again. Id.

Petitioner Burhan Uddin Ahmed is a citizen of Pakistan. R-7 (Opinion of the Twelfth Circuit). Ahmed entered the United States on September 8, 2001. Id. Though Ahmed purportedly entered the country to pursue a doctorate in veterinary medicine at Wilson University in Wilson, East Dakota, id., he rarely attended class and was in failing status by the end of his first semester. R-47 (Declaration of John R. Murphy).

Four months after his arrival in America, Ahmed was arrested as a material witness in the government's investigation of the September 11 attacks. R-7. On his arrest, the FBI seized Ahmed's laptop computer, which contained information about the use of chemicals as weapons of mass destruction and about fraudulent Social Security numbers. R-48.

On June 13, 2003, about one month before he was scheduled to go on trial, Ahmed was classified as an enemy combatant by an order signed by the President of the United States. R-7. The order stated that Ahmed "represent[ed] a continuing, present, and grave danger to the national security of the United States." Id. The order further determined that Ahmed's detention by the military was "necessary to prevent him from aiding al Qaeda."

Id. The order directed the Secretary of Defense to "detain [Ahmed] as an enemy combatant." Id. After the District Court granted the government's motion to dismiss the criminal charges against Ahmed, he was transferred to military custody at the Army Regional Consolidated Detention Facility in Souda, East Dakota, where he has since been detained. R-7-8.

Ahmed filed a petition for a writ of habeas corpus in the District of East Dakota to secure his release from military detention. R-8. In response, the government provided the court with the Declaration of John R. Murphy, Director of the Joint Task Force for Combating Terrorism. R-47-48. The Murphy Declaration described Ahmed's involvement with al Qaeda. Id. After reviewing the Declaration, the district court ruled that Ahmed could be detained as an enemy combatant if the government's allegations were true, but found that Ahmed was entitled to challenge these allegations before a magistrate judge. R-9.

At the subsequent hearing, the magistrate judge accepted the Murphy Declaration as adequate notice to Ahmed of the factual basis of his detention. Id. The judge then gave Ahmed 60 days to present rebuttal evidence. Id. Instead, Ahmed offered only a general denial and insisted that he had been given insufficient procedural rights. R-9-10. The magistrate judge

found that Ahmed had properly been detained as an enemy combatant, and the district court judge accepted the finding. R 10. On appeal, the circuit court held that Ahmed could be detained as an enemy combatant under the AUMF if the allegations against him were true but found that Ahmed had received insufficient process to challenge his status as an enemy combatant. R-28. The United States appealed this decision, and the Supreme Court granted certiorari. R-1.

SUMMARY OF ARGUMENT

The President detained Ahmed as an enemy combatant pursuant to the Congressional Authorization for Use of Military Force (AUMF), passed seven days after the attacks of September 11, 2001. Pub. L. No. 107-40, 115 Stat. 224 (2001). Through the AUMF, Congress authorized the President to use "all necessary and appropriate force" against organizations involved in the attacks of September 11, including al Qaeda. In authorizing military force, Congress also authorized military detention, which is a widely-accepted component of such force. See, e.g., ex parte Quirin, 317 U.S. 1, 28 (1942) (holding that detention is an "important incident" to military force); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (allowing a nation in military conflict to detain enemy combatants). Because the President

acted with the implicit authorization of Congress, his decision to detain Ahmed should be granted "the strongest of presumptions." Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Under such presumptions, it is clear that the President can constitutionally detain enemy combatants such as Ahmed.

The president is permitted to use his military detention authority in the circumstances of this case despite factors that distinguish Ahmed from other detainees who have come before American courts since September 11, 2001. Cf. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (describing petitioner's capture in Afghanistan and support of the Taliban). Although Ahmed is not a soldier for a national regime like the Taliban, he can nevertheless be detained because he is an active member of an organization that has conducted violent attacks against America and has been targeted by Congress for military force. Pub. L. No. 107-40, 115 Stat. 224 (2001). Although Ahmed was captured in the United States, he cannot avoid the President's detention power simply because he intended to conduct attacks in America, not overseas. See Quirin, 317 U.S. at 48 (holding that the President could detain enemy agents captured in America). And although Ahmed resided in the United States, he is not a civilian. Ahmed's active membership in al Qaeda and research

into chemical weapons bar him from claiming that title. Consequently, the President is permitted to detain Ahmed as an enemy combatant.

Ahmed has received a sufficient opportunity to challenge his classification as an enemy combatant under the Due Process Clause of the Fifth Amendment to the United States Constitution. Under the well established test laid out in Mathews v. Eldridge, 424 U.S. 319 (1976), the Court must balance three factors to determine if due process has been satisfied. These factors are the private interest at stake, the government interest at stake, and the "risk of erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." Id. at 334-35. Here, there are critical interests at stake for both the government and Ahmed. Namely, the government has a vital interest in protecting national security, while Ahmed has a similarly weighty interest in his personal physical liberty.

The government's interest in national security in this case includes both preventing terrorist attacks and preventing the disclosure of sources and methods of intelligence-gathering. Each of these interests is at its maximum here. According to government intelligence, Ahmed is an active member of al Qaeda who is working to prepare future attacks, and a full discovery

process would likely comprise strategies and information that the government is using to disrupt and capture al Qaeda sleeper agents in the United States.

The Court must find a framework that recognizes both the government's and Ahmed's interests, reducing the risk of erroneous deprivation of personal liberty while preventing the implementation of procedures that are "unworkable and inappropriate." Hamdi, 542 U.S. at 534. The Court has already established guidelines for appropriate procedures in enemy combatant cases through its decision in Hamdi, which set out the "core elements" of due process in such cases. 542 U.S. at 535. These elements were: 1) The detainee must receive notice of the factual basis for his classification and, 2) have a fair opportunity to rebut the Government's factual assertions 3) before a neutral decision-maker. See id. at 533.

Ahmed received all three of these core elements of due process in his hearing before the magistrate judge. Under the holding and reasoning of Hamdi, Ahmed has received a sufficient opportunity to challenge his detention. Ultimately, it was Ahmed's inability to provide more than a general denial of the Government's assertions and his inability to present any evidence in his defense that led to detention as an enemy

combatant. Thus, there is little chance that enhanced procedures would have changed the outcome of this case.

The government was constitutionally permitted to rely on a hearsay document in Ahmed's case, as it was in Hamdi's. See id. at 533-34. To the extent that some courts have discouraged the use of hearsay in enemy combatant cases, these Courts have failed to take into consideration the ability of judges to adequately weigh the probative value of hearsay evidence. A blanket rejection of hearsay would substitute an unreasonably inflexible rule for the judge's evidentiary discretion.

ARGUMENT

I. ACTING PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE, THE PRESIDENT CONSTITUTIONALLY DETAINED AHMED AS AN ENEMY COMBATANT.

The President detained Ahmed as an enemy combatant pursuant to the Congressional Authorization for Use of Military Force (AUMF), passed seven days after the attacks of September 11, 2001. Pub. L. No. 107-40, 115 Stat. 224 (2001). In authorizing military force, Congress also authorized military detention. And in authorizing military detention, Congress authorized the detention of Ahmed, who, according to government intelligence, is a member of al Qaeda who plans to engage in terrorist attacks

against America. At its maximum here, the President's constitutional power includes the detention of enemy combatants. That power applies to Ahmed. Ahmed should not be exempt from military detention based on his membership in a non-state terrorist organization or his domestic capture. Nor does Ahmed's residence in the United States make him a civilian ineligible for military detention.

A. Acting pursuant to the Authorization for Use of Military Force, the President has the authority to constitutionally detain enemy combatants.

To determine whether an executive act is constitutional, the act should first be classified in one of three categories described in Justice Jackson's concurrence in Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579. Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981) (following Youngstown, 343 U.S. at 635-38 (1952) (Jackson, J., concurring)). In the first Youngstown category, "the President acts pursuant to an express or implied authorization of Congress." 343 U.S. at 635. In this category, the President's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Id. at 635-36. Executive acts in this category are "supported by the strongest of presumptions and the widest latitude of judicial interpretation." Id. at 637. In contrast,

"when the President acts in the absence of congressional authorization he may enter 'a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.'" Dames & Moore, 453 U.S. at 668 (quoting Youngstown, 343 U.S. at 637). "Finally, when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb.'" Dames & Moore, 453 U.S. at 669 (quoting Youngstown, 343 U.S. at 637).

1. Congress implicitly authorized military detention in the AUMF.

In detaining Ahmed, President Obama has acted pursuant to the implied Congressional authorization contained in the AUMF. Under the AUMF, the President has the authority 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 ... in order to prevent any future acts of international terrorism against the United States..." Pub. L. No. 107-40, 115 Stat. 224 (2001).

When Congress passed the AUMF by joint resolution, it acted under its constitutional authority to authorize the use of military force. See Brown v. United States, 12 U.S. 110, 150

(1814) (describing Congress' authority regarding "all the powers incident to war").

Supreme Court precedent and international law make clear that detention is a "fundamental and accepted" component of the military force authorized by the AUMF. Boumediene v. Bush, 128 S. Ct. 2229, 2241 (2008) (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004)). The Supreme Court has long held that military detention is an "important incident to the conduct of war." Ex parte Quirin, 317 U.S. 1, 28 (1942). Consequently, the military can detain those who "without uniform come[] secretly through the lines for the purpose of waging war by destruction of life or property." Id. at 31. A bedrock of international law, the Geneva Conventions allow a nation in military conflict to detain prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Indeed, in international law, capture is "an obligatory alternative to killing under certain circumstances." Madeline Morris, After Guantanamo: War, Crime, and Detention, Harv. L. & Pol'y Rev. (2009).

Consequently, the President's decision to detain Ahmed should be granted the "strongest of presumptions." Youngstown, 343 U.S. at 647. Under such presumptions, the Supreme Court has frequently recognized that the President can constitutionally

detain enemy combatants. See, e.g., Quirin, 317 U.S. 1; Hamdi, 542 U.S. 507. Here, Congress and the President acted within their constitutional authority.

2. Ahmed's detention is consistent with congressional action subsequent to the AUMF.

Ahmed may argue that his detention conflicts with Congressional intent as manifested subsequent to the AUMF. In fact, Ahmed's detention is consistent with all congressional action since September 11, including the Patriot Act. See 8 U.S.C.S. § 1226a. In his concurrence in the lower court, Judge Gray of the Twelfth Circuit noted that the Patriot Act requires the Attorney General to detain aliens who have engaged in terrorist activities or "other activit[ies] that endanger[] the national security of the United States." 8 U.S.C.S. § 1226a(a)(3). Furthermore, the act allows the Attorney General to detain such aliens for up to 7 days without charge. 8 U.S.C.S. § 1226a(a)(5). It prohibits indefinite detention of aliens who are "detained solely under" its provisions. 8 U.S.C.S. § 1226a(a)(6). Citing this language, Judge Gray argues that the Patriot Act precludes Ahmed's detention. R-28.

However, the Patriot Act should not be read to limit the President's ability to use military force as authorized by the

AUMF. Located in part of the Patriot Act labeled "Enhanced Immigration Provision," the Act's detention provisions describe the power of the Attorney General to detain dangerous aliens under a wide range of circumstances. 8 U.S.C.S. § 1226a(a)(3). The provision is not limited to organizations that attacked the United States on September 11. In fact, it is not limited to terrorists at all. See 8 U.S.C.S. § 1226a(a)(3)(B) (requiring detention of any alien "engaged in any other activity that endangers the national security of the United States.").

Furthermore, since the Act's detention provisions are directed to the Attorney General, they clearly do not speak to the President's powers as Commander-in-Chief. The President's military powers are not exercised through the Attorney General. In addition, if Congress had intended to prohibit all indefinite detentions, it would not have prohibited such detentions only for detentions conducted "solely under" the Act. 8 U.S.C.S. § 1226a(a)(6). Clearly, then, the AUMF and Patriot Act have "different spheres of operation." al-Marri v. Pucciarelli, 534 F.3d 213, 301 (4th Cir. 2008) (Wilkinson, concurring in part, dissenting in part). Consequently, the Patriot Act is not relevant to the President's authority to detain Ahmed.

B. Detention under the AUMF is appropriate in the circumstances of this case.

Ahmed can be detained under the AUMF and the United States Constitution despite factors that distinguish him from other enemy combatants. Ahmed points to his membership in a non-state group, his capture in the United States, and his supposed civilian status. But none of these factors make Ahmed ineligible for military detention.

Ahmed is not ineligible from military detention under the AUMF merely because he is a member of a non-state group instead of a national army. Some have argued that the President can only use military force against actors associated with a state. See, e.g., al-Marri, 534 F.3d at 217-18 (Mozt, J., concurring in the judgment). However, through the AUMF, Congress authorized force not only against "nations" but also against "organizations," specifically, al Qaeda. Rasul v. Bush, 542 US 466, 470 (2004) (noting that the AUMF authorized the President to "wage a military campaign against al Qaeda."). Furthermore, in the years since the AUMF, Congress has reasserted its intent that members of al Qaeda be treated as enemy combatants subject to military force. The Military Commissions Act of 2006, for example, explicitly classifies members of al Qaeda as unlawful enemy

combatants subject to military detention. Pub. L. No. 109-336, § 948a (2006).

In authorizing force against al Qaeda, the AUMF operates well within the bounds of international law. The U.N. Charter states that the "inherent right of... self-defence" allows a nation to use force "if an armed attack occurs" against the nation. Charter of the United Nations, Article 51, 59 Stat. 1031, 1045 (1945). Crucially, the Charter does not distinguish between attacks committed by state armies and attacks committed by non-state groups like al Qaeda. See id. Undoubtedly, al Qaeda committed an armed attack against United States on September 11, 2001. Indeed, the attacks of September 11 resulted in more American casualties than the Japanese attack on Pearl Harbor. Sean D. Murphy, Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter, 43 Harv. Int'l L. J. 41, 47 (2002). Furthermore, the international community generally treated al Qaeda's actions as an "armed attack" justifying military force. See, e.g., NATO press release No. 124, Statement by the North Atlantic Council (Sept. 12, 2001) ("The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in

Europe or North America shall be considered an attack against them all.”)

Ahmed is also not exempt from military detention because he was captured in America. The AUMF does not by its text limit its authorization of force to foreign battlefields. See Pub. L. No. 107-40, 115 Stat. 224 (2001). Instead, the AUMF broadly authorizes the President to use force to prevent acts of terrorism. In addition, the Supreme Court has held that the President can detain enemy combatants captured in the United States. Quirin, 317 U.S. at 31.

On the other hand, Ahmed points to ex Parte Milligan, 71 U.S. 2 (1866), in which the Court held that the President could not detain an Indiana resident during the civil war. However, as noted by Judge Watts in the lower court, the facts of Milligan are very different from the facts of the present case. R-16. Petitioner Milligan was a member of a Confederate sympathizer group, an organization that bears little resemblance to al Qaeda. Milligan, 71 U.S. at 102. Unlike al Qaeda, Milligan’s group had not conducted attacks on the United States, let alone attacks associated with massive casualties like those of September 11. Id. And critically, unlike al Qaeda, Milligan’s group had not been targeted for military force by Congressional declaration.

In relying on Milligan, Ahmed ignores the precedential force of cases such as Quirin that “postdate[] and clarif[y] Milligan.” Hamdi, 542 U.S. at 523. In Quirin, the Court held that the President could constitutionally detain foreign agents captured in the United States who intended to intended to conduct attacks within the country. 317 U.S. at 48. As this Court has stated, “brushing aside such precedent” would be “unjustified and unwise.” Hamdi, 542 U.S. at 523.

Finally, Ahmed argues that his residency in the United States, along with the factors discussed above, make him a civilian ineligible for military detention. Cf. al-Marri, 534 F.3d at 230 (Mozt, J., concurring in the judgment) (“[O]ur Constitution does not permit the Government to subject *civilians* within the United States to military jurisdiction.” (emphasis in original)). However, Ahmed is not a civilian by any reasonable definition of the term. First, Ahmed is a member of a group that has conducted large-scale, violent attacks against America and has been targeted by Congress for military force. Second, by the evidence offered by the government, Ahmed was actively working as a “sleeper agent” to continue such attacks. R-47. For example, Ahmed’s computer included information about the use of chemical weapons. R-48.

As the Fourth Circuit has held, al Qaeda sleeper agents such as Ahmed are enemy combatants to military detention. See al-Marri, 534 F.3d at 216 (per curiam). And, as this Court has repeatedly held, enemy combatants can be detained even when they have lived in the United States, Quirin, 317 U.S. at 20, and indeed even when they are U.S. citizens, Hamdi, 542 U.S. at 510.

II. AHMED RECEIVED SUFFICIENT PROCEDURAL PROTECTIONS TO CHALLENGE HIS DESIGNATION AS AN ENEMY COMBATANT.

The Fifth Amendment of the United States Constitution provides that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. However, “due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation.” Moyer v. Peabody, 212 U.S. 78, 84 (1909). In Mathews v. Eldridge, 424 U.S. 319 (1976), the Court set out a balancing test for determining the appropriate amount of due process needed under a given set of circumstances. Under Mathews,

“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest

through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 334-35.

Any analysis of Ahmed's due process rights must therefore begin with an analysis of the Mathews factors.

A. Ahmed has an important interest in physical liberty.

The private interest claimed by Ahmed is "the most elemental of liberty interests - the interest in being free from physical detention by one's own government." Hamdi, 542 U.S. at 529. Ahmed was subject to indefinite detention as an enemy combatant designated under the AUMF.¹

¹ In fact, Ahmed's private interest claim might even be lesser than that of Yaser Hamdi based on the fact that Hamdi was a United States citizen, while Ahmed was a Pakistani national residing in the United States at the time of his arrest and detention. See Hamdi, 542 U.S. at 510. It is a widely accepted proposition that "citizens and non-citizens possess different degrees of constitutional rights" in a variety of areas under

B. The government has a vital interest in protecting national security.

However, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963). Just as there is no private interest more elemental than the interest in being free from physical detention, "[i]t is 'obvious and unarguable' that the law. al-Marri v. Hanft, 378 F.Supp.2d 673, 679 (D.S.C. 2005); also cf. Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). This distinction between citizens and non-citizens, coupled with the recognition that "the authority to detain enemy aliens in times of war is not a novel concept to the executive branch of our government," al-Marri, 378 F.Supp.2d at 679 (referring to the Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577 (codified at 50 U.S.C. § 21)), suggests that the individual alien's interest in being free from physical detention may be weaker than the same interest wielded by a United States citizen. While it is true that Ahmed is not an enemy alien insofar as Pakistan is not formally at war with the United States, as a non-U.S. citizen, he is nevertheless subject to a lesser range of protections under the law.

no governmental interest is more compelling than the security of the Nation". Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting in part Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)). This security interest applies not merely to the battlefield itself, but to its extensions in other fields, including foreign relations and intelligence gathering. As the Court has held, "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." Snepp v. United States, 444 U.S. 507, 509 (1980).

Specifically, there are two "weighty and sensitive" government interests at stake in cases such as Ahmed's. Hamdi, 542 U.S. at 531. First, the government seeks to ensure "that those who have in fact fought with the enemy during a war do not return to battle against the United States." Id. at 531-32. In the exigencies of modern warfare, where a state is engaged in conflict with a decentralized, non-state organization united by ideology rather than a centralized, foreign state united by nationality, the boundaries of the battlefield have expanded dramatically. Cf. al-Marri v. Pucciarelli, 534 F.3d 213, 295 (Wilkinson, J., concurring in part and dissenting in part) (referring to the "sources of this nation's vulnerability - its

long borders, its multiple ports of entry, its densely-packed cities, the dispersions of lethal materials, the march of advancing technologies, and the widening distribution of knowledge as to the means and implements of mass destruction.”). In fact, the government may have even a greater interest in ensuring national security within the borders of the United States than ensuring the safety of its troops abroad, given the disparity of training and difference in an expectation of security between a soldier on an enemy battlefield and a civilian in the comfort of his home. A well-placed sleeper agent within the United States armed with a keyboard could create far more havoc than any foreign national armed with a Kalashnikov. In either case, a compelling governmental interest exists in ensuring that this agent does not return to wage war against the United States in any context.

Second, the government has an interest in reducing “the practical difficulties that would accompany a system of trial-like process [while the government is] engaged in the serious work of waging battle.” Hamdi, 542 U.S. at 531-32. In past cases, the major concern was that “discovery into military operations would ... intrude on the sensitive secrets of national defense.” Id. at 532. In Ahmed’s case, discovery would likely trespass on “sources and methods of intelligence gathering” that

play a key role in counter-intelligence and domestic counter-terrorist efforts, and by extension, national security. See Boumediene, 128 S.Ct. at 2276 (2008) (“We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering.”). Disclosure of strategies of investigation, of sources of intelligence about terrorist networks, and of evidence linking Ahmed to other al Qaeda members all may be leaked to other sleeper agents in the United States so as to allow them to avoid capture. As such, the Court has traditionally limited discovery of even “superficially innocuous information” when it might facilitate the discovery of more sensitive matters. CIA v. Sims, 471 U.S. 159, 178 (1985). As the Court balances the competing interests at stake, it is crucial that the protection of these sources and methods of intelligence gathering are not unduly compromised, and that the government’s need for military secrecy is accorded its well-deserved weight.

C. The District Court afforded Ahmed process consistent with Hamdi, which set out a series of workable procedures that balance the risk of erroneous deprivation of liberty with avoiding an undue burden on important government interests.

The final consideration under the Mathews balancing test is whether the risk of erroneous deprivation of individual liberty

under the given set of procedures is so great that additional or substitute procedures would provide probable value towards reducing the risk of erroneous deprivation without becoming “unworkable and inappropriate.” Hamdi, 542 U.S. at 535. The plurality opinion in Hamdi laid out procedures for a detainee to challenge his designation as an enemy combatant and subsequent detention. The Court determined that these procedures would provide the greatest assurances against risk of erroneous deprivation while protecting important government interests. Under the Hamdi test, the “core elements” for due process thus contain three major components: 1) The detainee must receive notice of the factual basis for his classification and 2.) have a fair opportunity to rebut the Government’s factual assertions before 3.) a neutral decision-maker. See id. at 533. These core elements were satisfied in Ahmed’s case.

Ahmed received notice of the factual basis for his classification. He was confronted by the government’s factual allegations against him in district court with the Murphy Declaration. R-8. In the Murphy Declaration, the government alleged, among other facts, that Ahmed attended an al Qaeda-run terrorist training camp in Afghanistan for 18 months before the United States, that he was instructed to “investigate the plausibility of hacking into the main-frame computer systems of

the Social Security Administration" and to "secur[e] revenue for future terrorist attacks through Social Security fraud." R-47. The Murphy Declaration further set forth the results of an examination of Ahmed's laptop computer, which included evidence that Ahmed was "conducting research regarding use of chemicals as weapons of mass destruction" as well as evidence of "efforts to sell Social Security numbers." R-47-48.

After the presentation of the government's evidence, Ahmed was given the opportunity to "challenge the factual basis of his detention" in a hearing in front of a magistrate judge who was appointed by the district court. R-9. The Supreme Court has consistently placed decision-making power in a due process context in the hands of "neutral magistrates." See, e.g., U.S. v. Salerno, 481 U.S. 739, 748 (1987) ("If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists."). As such, the hearing that Ahmed received falls well within the definition of 'neutral decision-maker' that the Supreme Court envisioned as a proper venue for determining the propriety of Ahmed's detention in accordance with due process.

Finally, while the Supreme Court has offered a variety of interpretations of what constitutes a fair opportunity for rebuttal, Ahmed was allowed 60 days to present any rebuttal

evidence in his hearing. R-9. This was a far fuller opportunity for rebuttal that the Court has approved in other cases, including, for example, the 15-day period for rebuttal without the right to call witnesses that was considered a "fair opportunity for rebuttal" for convicted criminals to challenge the basis for their placement in the Ohio Supermax facility. Wilkinson v. Austin, 545 U.S. 209, 226 (2005). Ahmed's 60-day opportunity to produce evidence against his detention should be considered a fair opportunity for rebuttal.

Thus, Ahmed should be considered to have received the "core elements" of due process as identified by Hamdi. Ultimately, it was Ahmed's inability to provide more than a general denial of the Government's assertions and his inability to present any evidence in his defense that contributed to his continued detention and designation as an enemy combatant -- not the absence of any additional procedures.

D. The circumstances of Ahmed's arrest and detention do not warrant more stringent procedures than what was provided in Hamdi.

The plurality in Hamdi also discussed additional procedural considerations, including an acceptance of hearsay as the government's "most reliable available evidence" in some circumstances and a burden-shifting framework that granted a

presumption in favor of the Government's evidence unless the habeas petitioner provided "more persuasive evidence that he falls outside the criteria [of being an enemy combatant]." Hamdi, 542 U.S. at 533-34. While these considerations need not apply to every case involving a habeas petition from a detainee under the AUMF, the opinion noted that, "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. In Ahmed's case, the magistrate judge determined that due process would be satisfied by allowing Ahmed essentially the same procedural protections that were outlined under Hamdi. Compare R-9 with 542 U.S. at 533.

The fact that Ahmed was detained in East Dakota instead of in Afghanistan, and that he was purportedly a civilian rather than a Taliban soldier, does not change the fact that he was associated with what was essentially the "military arm" of al Qaeda, cf. Quirin, 317 U.S. at 37, and that he was ultimately detained not as a run-of-the-mill criminal defendant but as an enemy combatant. Some have suggested placing an additional burden on the government to prove that its hearsay evidence was the "most reliable available evidence" that it could supply. See, e.g., al-Marri, 534 F.3d at 273 (Traxler, J., concurring).

However, the Hamdi plurality never required that hearsay be conclusively demonstrated to be the most reliable evidence, only that it "may" need to be accepted as such after the Court had balanced the competing interests in the particular case. 542 U.S. at 335. In Hamdi's case, the Court concluded that "any factfinding imposition created by requiring a knowledgeable affiant to summarize these records [made in the ordinary course of military affairs] to an independent tribunal is a minimal one," but suggested that any more procedural protection akin to "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting." Id. Under this standard, the Murphy Declaration was sufficient to provide Ahmed with notice of the basis of his designation.

Furthermore, it is important to note that evidence in an enemy combatant hearing is heard by a district or magistrate judge, not a jury. Because judges have the experience and judgment to accord hearsay evidence its proper weight, there is significantly less risk that such evidence will be misused than in usual jury cases. Cf. Chris Funderburg, Evidence Law at SOAH, 10 Tex. Tech. Admin. L. J. 423, 431 (2009) ("Unlike a lay jury, the [judge]'s legal training and experience guide her valuation of the unexcepted hearsay, [allowing] her to evaluate the

unexcepted hearsay's potential probity in light of her knowledge of the evidence's intrinsic unreliability, as well as to consider any other circumstances that may indicate whether it is particularly trustworthy or suspect evidence.""). Instead of rejecting hearsay testimony in every circumstance unless the government proves that it is the most reliable evidence available, the Court should allow the neutral, experienced decision-maker to exercise his or her discretion. The judge can weigh the government's hearsay testimony in accordance with the credibility of the witness and balance it against the evidence produced by the detainee. If necessary, the judge can ask for proof that hearsay is the most reliable evidence available. Removing this discretion would unwisely limit the flexibility of the process while doing little to reduce the risk of erroneous deprivation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed with respect to its holding that that President is permitted to detain as an enemy combatant a member of al Qaeda who resides in and is captured within the United States. The judgment of the court of appeals should be reversed with respect to its holding that Ahmed was not afforded

sufficient process to challenge his designation as an enemy combatant.

Respectfully submitted.

Team 1678.

January 2010.

APPENDIX**1. United States Constitution, Amendment 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.

2. 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,

A. SECTION 1. SHORT TITLE.

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

B. SEC. 2. AUTHORIZATION FOR USE OF 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 supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.