

No. 08-11144

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IN THE  
Supreme Court of the United States

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BURHAN ADDIN AHMED,  
PETITIONERS,

V.

UNITED STATES OF AMERICA,  
RESPONDENTS

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

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BRIEF FOR RESPONDENTS

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**Counsel of Record, Team 2068**

## QUESTIONS PRESENTED

1. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes, and if so whether the Constitution allows, the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired withal Qaeda to engage in terrorist activities?
2. Whether the process afforded by the district court to challenge a designation as an "enemy combatant" was sufficient under the requirements of the Fifth Amendment?

**PARTIES TO THE PROCEEDING**

The following individuals and entities were parties to the proceeding in the court below:

Petitioners:

Burhan Uddin Ahmed

Respondents:

The United States of America

**TABLE OF CONTENTS**

QUESTIONS PRESENTED.....i  
PARTIES TO THE PROCEEDING.....ii  
TABLE OF CONTENTS.....iii  
TABLE OF AUTHORITIES.....v  
OPINIONS AND ORDERS ENTERED IN THE CASE.....vi  
STATEMENT OF JURISDICTION.....vi  
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE..vi  
STATEMENT OF THE CASE.....1  
SUMMARY OF ARGUMENT.....4  
ARGUMENT.....5

I. THE AUMF AUTHORIZES AND THE CONSTITUTION DOES NOT PROHIBIT DETAINING AHMED WITHOUT CHARGES OR TRIAL ..... 5

A. The President Has The Legal Authority To Detain Ahmed Pursuant To The Plain Text Of The AUMF ..... 5

B. Ahmed’s Detention Is Justified By His Status As An “Enemy Combatant,” And Because He Is “Part Of” aL Qaeda ..... 8

C. Ahmed’s Detention Is Constitutional Under The *Youngstown* Framework ..... 15

II. THE LEVEL OF DUE PROCESS THE DISTRICT COURT AFFORDED PETITIONER BURHAN UDDIN AHMED IS CONSISTENT WITH THE FRAMEWORK SET FORTH IN THE SUPREME COURT CASE OF *HAMDI v. RUMSFELD* AS HE WAS PROVIDED NOTICE OF THE FACTUAL BASIS FOR HIS CLASS CLASSIFICATION AND A FAIR OPPORTUNITY TO REBUT

THE GOVERNMENT’S FACTUAL ASSERTIONS BEFORE A NEUTRAL  
DECISIONMAKER ..... 19

A. The Court of Appeals Misinterpreted *Hamdi* When Requiring The District Court To Consider The Circumstances Of Ahmed’s Capture ..... 21

B. The Court of Appeals Misinterprets *Hamdi* When Requiring the District Court To Consider To Provide An Explanation Before Considering The Murphy Declaration ..... 23

C. The Murphy Declaration Provides Ample Notice To Ahmed To Effectively Produce Rebuttal Evidence For His Defense ..... 25

D. It Is Improper To Compare The risk Of Erroneous Deprivation Of An Enemy Combatant Proceeding To A Proceeding In The Criminal Justice System ..... 28

E. The Court Should Not Afford Ahmed Another Opportunity To Produce Rebuttal Evidence As He Was Given Ample Opportunity To Prepare A Defense But Elected To Not Actively Participate In The Proceeding ..... 29

CONCLUSION ..... 30

**TABLE OF AUTHORITIES**

**Cases:**

*Ahmed v. United States*, No. 06-9701, 1, (12th Cir. Nov. 24, 2008) (en banc) ..... *passim*

*Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.C. Cir. 2009) ..... 14

*al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) ..... 6, 11-13, 20, 23

*Boumediene v. Bush*, 126 S.Ct. 2229 (2008) ..... 13, 14, 26, 29

*Ex Parte Milligan*, 71 U.S. 2 (1866) ..... 18, 19

*Ex Parte Quirin*, 317 U.S. 1 (1942) ..... 8, 10, 18

*Gherebi v. Obama*, 609 F. Supp. 2d 42 (D.C. Cir. 2009) .... 11, 14

*Hamdi v. Rumsfeld*, 542 U.S. 597 (2004) ..... *passim*

*Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.C. Cir. 2009) ... 14, 15

*In re Guantanamo Bay Cases*, 355 F. Supp. 2d 442 (D.C. Cir. 2005) ..... 26

*Mathews v. Eldridge*, 424 U.S. 316 (1876) ..... 20

*Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) ..... 11, 12

**Constitution and Statutes:**

U.S. Const. amend. V ..... 19

Authorization for Use of Military Force ("AUMF"), Pub.L. No. 107-40, § 2(a), 115 Stat. 224 (2001) ..... *passim*

Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (The Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 ..... 16-18

## **OPINIONS AND ORDERS ENTERED IN THE CASE**

The opinion of the United States Court of Appeals for the Twelfth Circuit, *Ahmed v. United States*, No. 06-9701, is reported at \_\_F.3d\_\_ (12th Cir. 2008), and is set forth in the Record at pages 5 through 46. The opinion of the United States District Court for the District of East Dakota, No. 07-XXXXX is published at \_\_F.Supp.2d\_\_.

## **STATEMENT OF JURISDICTION**

The United States Court of Appeals for the Twelfth Circuit entered a Judgment on November 24, 2008. *Ahmed v. United States*, at 1. Petitioners timely sought Certiorari, which this Court granted on October 2, 2009. (R 1). This Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **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.

**Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (The Patriot Act),  
Pub. L. No. 107-56, 115 Stat. 272**

SEC. 412. MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW.

(a) IN GENERAL- The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after section 236 the following:

MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS;  
JUDICIAL REVIEW

SEC. 236A. (a) DETENTION OF TERRORIST ALIENS-

(1) CUSTODY- The Attorney General shall take into custody any alien who is certified under paragraph (3).

(2) RELEASE- Except as provided in paragraphs (5) and (6), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (6), such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

(3) CERTIFICATION- The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien--

(A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(a)(4)(B); or

(B) is engaged in any other activity that endangers the national security of the United States.

(4) NONDELEGATION- The Attorney General may delegate the authority provided under paragraph (3) only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

(5) COMMENCEMENT OF PROCEEDINGS- The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

(6) LIMITATION ON INDEFINITE DETENTION- An alien detained solely under paragraph (1) who has not been removed under section 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained 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.

(7) REVIEW OF CERTIFICATION- The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

## STATEMENT OF THE CASE

The Appellant Mr. Burhan Uddin Ahmed is a Pakistani citizen and came to the United States lawfully with his family on September 8, 2001, three days prior to the September 11th bombings of the Twin Towers in New York. *Ahmed v. United States*, No. 06-9701, 1, 2 (12th Cir. Nov 24, 2008).<sup>1</sup> Ahmed allegedly entered the United States to pursue a doctor of veterinary medicine at Wilson University in Wisconsin, East Dakota. *Id* at 3. Only four months after entering the country on January 3, 2002, Ahmed was arrested and detained in Wilson by federal agents. *Id*. The purpose of Ahmed's arrest was for the Government to use him as a material witness in their investigation of the 9/11 attacks. *Id*.

In November 2002, approximately one year following Ahmed's arrest, he was charged in the District of East Dakota with the possession of counterfeit Social Security cards with the intent to defraud. *Id*. Following this initial charge, in January 2003 Ahmed was also charged with making a false statement to the FBI. To both of these charges Ahmed plead not guilty. *Id*.

On the morning of June 13, 2003 the President signed an order stating that he had determined for the United States of

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<sup>1</sup> The *Ahmed v. United States* opinion begins on page 5 of the record, which hereinafter will be considered page 1 of the opinion for citation purposes.

American that Ahmed is (1) an enemy combatant; (2) is closely associated with al Qaeda; (3) engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism; (4) possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda' and (5) represents a continuing, present, and grave danger to national security of the United States. *Id.* The President ordered the Attorney General to surrender Ahmed to the Secretary of Defense, and directed that he be detained as an enemy combatant. *Id.*

After the Presidential order, the District of East Dakota granted the government's ex parte motion to dismiss the criminal charges against Ahmed. *Id.* at 4. He was then transferred to the Army Regional Consolidated Detention Facility in Souders, East Dakota and placed securely in military custody. *Id.*

Following the transfer into military custody Ahmed filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the District of East Dakota. *Id.* Ahmed argues that he is being unlawfully held as an enemy combatant and claims that the government must either file criminal charges against him or release him. *Id.* He also contends that he must be afforded a hearing to challenge his classification as an enemy combatant. *Id.*

The Government responded to these contentions and provided good cause to why he is currently designated as an enemy combatant and should not be released in the form of a Declaration prepared by John R Murphy, the Director of the Joint Task Force for Combating Terrorism. *Id.* The Declaration states in detail that Ahmed was an operative of al Qaeda acting as a sleeper agent in the United States and had received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator of the 9/11 attacks. (Murphy Decl. ¶ ¶ 9-10). The Declaration also states that he received terrorist training when in Afghanistan and had communicated directly with Osama Bin Laden and other high-ranking al Qaeda members. (*Id.* at ¶ 7). Furthermore it details what was found on Ahmed's personal laptop, what information was intercepted from his telephone communications made from pay phones in the Wilson, East Dakota area, and the list of stolen social security card information found in the pocket of his laptop case. (*Id.* at ¶ ¶ 12-18). It concludes with the determination that Ahmed is an enemy combatant and that he must be detained to prevent him from further aiding al Qaeda in its effort to harm the United States. (*Id.* at ¶ 19).

The magistrate considered the Murphy Declaration and allowed Ahmed to respond in his own defense. Instead of actively participating, however, Ahmed responded in a general

denial and did not present rebuttal evidence. Instead he contended that he was not an enemy combatant and that the procedures afforded to him by the magistrate judge were unconstitutional. *Ahmed*, No. 06-9701, at 5.

#### **SUMMARY OF ARGUMENT**

First, the AUMF authorizes the president to detain Ahmed as an enemy combatant without criminal charge or trial based on his membership in al Qaeda, and steps taken in furtherance of terrorist activities on U.S. soil. Because he is situated almost exactly like the al Qaeda operatives who in fact committed the 9/11 attacks it belies common sense that the AUMF, passed only one week after the tragic attacks in order to give the president authority to respond with force to al Qaeda and associated organizations, did not intend to target Ahmed. Moreover, because the president is acting pursuant to an Act of Congress, his power is at its highest ebb and his actions are presumptively constitutional under the *Youngstown* framework. Second, the Court in *Hamdi* provided a clear framework regarding the procedural due process a detainee challenging his enemy combatant status should be afforded. *Hamdi* requires that the detainee be provided notice of the factual notice for his classification and an opportunity to rebut the Government's factual assertions before a neutral decisionmaker. The Murphy Declaration serves as clear factual notice and the district

court provided Ahmed ample opportunity to produce rebuttal evidence but elected to not actively participate in his defense. Therefore the district court properly afforded Ahmed the requisite process as required by *Hamdi*.

## ARGUMENT

### I. THE AUMF AUTHORIZES AND THE CONSTITUTION DOES NOT PROHIBIT DETAINING AHMED WITHOUT CHARGES OR TRIAL.

#### A. The President Has The Legal Authority To Detain Ahmed Pursuant To The Plain Text Of The AUMF.

Because Ahmed is "closely associated with" al Qaeda, an organization that planned and committed the 9/11 attacks on the United States, his detention is specifically authorized by the text of the Authorization for Use of Military Force. *Ahmed*, No. 06-9701, at 3 (12th Cir. Nov 24, 2008). The AUMF authorizes, the president "[T]o 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." Authorization for Use of Military Force ("AUMF"), Pub.L. No. 107-40, § 2(a), 115 Stat. 224(2001). The AUMF authorizes the president alone to determine what the targets are, and authorizes him to act against such

organizations or persons, who planned those attacks or future attacks against the United States. Upon arrest, Ahmed was in a situation identical to al Qaeda operatives who planned the 9/11 attacks. He was a member of al Qaeda and was sent to the United States as a sleeper agent. He was gathering information about chemicals to be used as a weapon of mass destruction, and was in contact with high-ranking al Qaeda officials and he had obtained 40 social security cards to be used to execute a plot against the Social Security Administration. (Id. at ¶¶ 5-11, 17-18).

The President determined, that Ahmed represents exactly the type of threat that Congress was concerned with when they passed AUMF only one week after the tragic 9/11 attacks. *Ahmed*, No. 06-9701, at 3. The 9/11 terrorist attacks were orchestrated by al Qaeda, and resulted in the death of nearly 3000 people on U.S. soil. *Id* at 2. Congress clearly meant to target persons and organizations situated like those that planned the 911 attacks, "in order to prevent future acts of international terrorism," by such persons or organizations. *Id.* at 16,19. AUMF, 115 Stat. 224. The al Qaeda operatives that planned the 9/11 attacks, like Ahmed were living legally in the United States when they planned and executed the hijacking, and like Ahmed, planned to attack domestic targets. *al-Marri v. Pucciarelli*, 534 F.3d 213, 297 (Wilkinson, J., concurring in part and dissenting in part)(4th Cir. 2008), *vacated sub nom. al-Marri v. Spagone*, --- U.S. ----,

129 S.Ct. 1545, (2009).<sup>2</sup> Moreover, the President's order stated that Ahmed is closely associated with al Qaeda, an organization responsible for the 9/11 attacks. *Ahmed*, No. 06-9701, at 3. Thus, Ahmed is an appropriate target under the AUMF because he is part of an organization the president is authorized to use force against, and is an individual planning future attacks which the statute was meant to protect against "both at home and abroad." AUMF, 115 Stat. 224.

The presidential order designating Ahmed as an enemy combatant supports detention as necessary and appropriate under the AUMF in order to prevent future acts of terrorism. The order stated that Ahmed had "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism,"; "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda"; and that he "represents a continuing, present, and grave danger to the national security of the United States." *Ahmed*, No. 06-9701, at 3. Because the threat comes directly from the organization responsible for the 9/11 attacks, Ahmed's detention is easily as "necessary and appropriate" as the detention which the Supreme Court of the United States deemed authorized by the AUMF in

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<sup>2</sup> Certiorari was granted December 5, 2008. Subsequently, the Government filed a motion to dismiss for mootness because al-Marri had been criminally charged. As a result, the Fourth Circuit opinion was vacated and remanded. Although not binding precedent for any court, the Fourth Circuit opinion was not vacated based on changing legal standards, and is therefore persuasive.

*Hamdi v. Rumsfeld*. 542 U.S. 507 (2004). There, Hamdi's association with the Taliban, "an organization known to have supported the al Qaeda terrorist network responsible for the 911 attacks" justified his detention. *Hamdi*, 542 U.S. at 518. In that case, a majority of the Court found explicit authorization in the text of the AUMF.<sup>3</sup> Authorization is no less explicit in this case. *Ahmed*, No. 06-9701, at 16.

**B. Ahmed's Detention Is Justified By His Status As An "Enemy Combatant," And Because He Is "Part Of" al Qaeda.**

Ahmed's status as an "enemy combatant," as designated by the President, also supports his detention under the AUMF. In *Hamdi*, a majority of the Supreme Court<sup>4</sup> understood the AUMF to give explicit authorization for the detention of a U.S. citizen who fought alongside the Taliban. *Hamdi*, 542 U.S. at 517, 579. The Court concluded that AUMF authorization was explicit concerning "enemy combatants" who were "part of or supporting forces hostile to the United States or coalition partners," and who "engaged in armed conflict against the United States." *Id.* Although the *Hamdi* plurality only considered the detention of enemy combatants in that particular context, the plurality reasoned that lower courts would further define the term. *Hamdi*, 542 U.S. at 522 note 1. The *Hamdi* plurality relied on the laws

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<sup>3</sup> Both the plurality and the Justice Thomas' dissent agreed that authorization to detain Hamdi pursuant to the AUMF was explicit. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517, 579 (2004).

<sup>4</sup> See Footnote 2, *supra*.

of war and the rationale of *Ex Parte Quirin*, 317 U.S. 1 (1942), opining that the United States may detain persons properly defined as "enemy combatants" for the duration of hostilities as part of the president's exercise of necessary and appropriate force based on the threat such persons pose if released. *Hamdi*, 542 U.S. at 519. In Hamdi's case this was the threat of returning to battle and taking up arms against the U.S. in Afghanistan, In Ahmed's case it was his status as a sleeper agent for al Qaeda, and concerted actions aimed at future terrorist attacks on United States targets.

Although Ahmed was not in direct combat against the United States, the threat he posed was no less serious than the threat posed by Hamdi. The type of battle waged by the onset of the 9/11 terrorist attacks may not look like traditional warfare, but the threat to national security posed is just as real, and the need to detain persons fighting alongside enemy organizations prior to judicial proceedings in order to quell such threats is just as poignant. *See Ahmed, No. 06-9701*, at 15 (writing, "we are clearly fighting an enemy that declared war on us by staging a dramatic strike against our country.")

The threat Ahmed posed was precisely the threat the AUMF was concerned with. Ahmed entered the U.S. as an active al Qaeda operative. He trained in an al Qaeda-run terrorist training camp in Afghanistan for 18 months where he was trained in the use of

poisons. His computer revealed highly technical research on the use of chemical warfare for use as a weapon of mass destruction. Furthermore, the Twelfth Circuit in *Ahmed* opined that his academic aspirations were demonstrably false, he was failing out of school and had a "clear association with and allegiance to al Qaeda's mission, and was taking steps to support it." *Ahmed*, No. 06-9701, at 15. Because Ahmed "represents a continuing grave threat to the United States," he "must be detained to prevent him from aiding al Qaeda in its efforts to attack and harm the United States." Moreover, the Twelfth Circuit correctly concluded that "Ahmed's mission was not appreciably different from the German soldier dispatched here to attack military installations in *Ex Parte Quirin* or the al Qaeda operatives dispatched here to attack this country on September eleventh, 2001. *Id.* at 17, quoting *Ex Parte Quirin*, 317 U.S. 1 (1942). The AUMF authorizes Ahmed's Military detention because Ahmed is exactly the type of threat the AUMF was designed to protect against. *Id.* at 15.

Ahmed's detention is authorized because he is standing in exactly the position of the al Qaeda operatives who planned the 9/11 attacks. The *Hamdi* plurality did not doubt congressional intent to target Hamdi based on his association with the Taliban, "an organization known to have supported the al Qaeda terrorist network." Therefore, it belies common sense that

Congressional authorization was any less explicit for Ahmed, an al Qaeda operative. *Hamdi*, 542 U.S. 518. In other words, Ahmed arrived in the United States three days before the attacks, at which time he was a sleeper agent for al Qaeda. *Ahmed*, No. 06-9701 at 2. Ahmed has serious ties to high-ranking al-Qaeda officials like Osama Bin Laden and Khalid Sheikh Muhammad. He volunteered to be a Martyr for the al Qaeda cause and do whatever was asked of him. Only one week after the tragic attacks, the AUMF was passed authorizing the president to use "all necessary and appropriate force," against organizations and persons who planned the attacks. Therefore, "it strains reason to believe that Congress, in enacting the AUMF in the wake of [the 9/11] attacks, did not intend for it to encompass al Qaeda operatives [like Ahmed, who were] standing in the exact position as the attackers who brought about its enactment." *Gherebi v. Obama*, 609 F. Supp. 2d 43, 51 (D.C. Cir. 2009) quoting, *al-Marri*, 534 F. 3d at 260 (Traxler, J., concurring).

Because he is a member of al Qaeda, Ahmed is detainable as an "enemy combatant," according to subsequent federal case law. The *Hamdi* plurality suggested that the bounds of the enemy combatant category would be defined by the lower courts and subsequent Supreme Court cases. *Hamdi*, 542 U.S. at 522, n.1. Other federal courts have since addressed the president's scope of authority to detain enemy combatants. The Fourth Circuit in

*Padilla v. Hanf*, 423 F. 3d 386 (4th Cir. 2005), held that the AUMF authorized the detention of Jose Padilla, a U.S. Citizen captured on U.S. soil who was "closely associated with al Qaeda," who took up arms on behalf of al-Qaeda, and who traveled to the US for the purpose of "prosecuting that war on American soil, against American citizens and targets." *Id.* at 389. In 2008, Fourth Circuit, ruled<sup>5</sup> that al-Marri, a Qatari citizen and lawful resident of the United States, who according to government declarations was sent to the U.S. as a sleeper agent for al Qaeda, was being legally detained as an enemy combatant. *al-Marri*, 534 F.3d 213 (4th Cir. 2008).

Like Padilla, Ahmed was closely associated with al Qaeda and traveled to the U.S. in order to wage war against American citizens and targets. Prior to coming to the United States, Ahmed trained with al Qaeda and was commissioned by them to enter the United States as a sleeper agent, intending to execute al Qaeda orders. Like Padilla, his express reason for entering the U.S. was to plan and execute hostile warlike acts on American targets. Like Padilla, Ahmed was captured on U.S. soil. The record of Ahmed's extensive al Qaeda training steps taken in the war against United States targets by al Qaeda operatives show that like Padilla, Ahmed "entered this country bent on committing hostile acts on American soil," and as a

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<sup>5</sup> By a 5:4 vote the court held that the AUMF authorized al-Marri's detention. *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008).

result falls within the definition of enemy belligerent or enemy combatant. *Id.* at 392.

Like al-Marri, al Qaeda sent Ahmed to the U.S. as a sleeper agent, further supporting his detention as an enemy combatant. al-Marri entered the U.S. on September 10, 2001, Ahmed entered the country only two days earlier. *Id.* at 219; *Ahmed*, No. 06-9701, at 3. Like al-Marri, Ahmed came with his family ostensibly to pursue an academic degree. *Id.* Both were picked up several months later as material witnesses in relation to the 9/11 attacks. *Id.* Both were actually sent by al Qaeda to serve as sleeper agents, and when given the opportunity neither offered rebuttal evidence to refute evidence supporting their enemy combatant status. *al-Marri*, 534 F.3d 213, 221; *Ahmed*, No. 06-9701, at 5.

Ahmed is "part of" al Qaeda, and therefore detainable as an enemy combatant. The Supreme Court has thus far not set the bounds for who qualifies as an "enemy combatant," but our official government position and lower court acceptance that position offers some guidance. In *Boumediene v. Bush*, 583 F. Supp. 2d 133 (D.C. Cir. 2008), the Court adopted the government's definition for enemy combatant<sup>6</sup> defining an "enemy

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<sup>6</sup> The Department of Defense created the definition in 2004 to be employed by the Combatant Status Review Tribunals (CSRT's) in order to determine who could be detained as an "enemy combatant." District of Columbia Circuit Judge Leon in *Boumediene* considered that this definition was "blessed by congress," because when they enacted the MCA they defined "unlawful enemy combatant," to

combatant as, "an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.* at 135. In March of 2009 in an official Memorandum, we reiterated principally the same definition, adding the word, "substantially" before supported, so that the official government position is that persons are detainable if they "were part of, or *substantially* supported, Taliban or al-Qaeda forces..." Otherwise, the definition remained unchanged. See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53. (D.C. Cir. 2009). Finally, a number of district court opinions have employed the "part of" language accepted in *Boumediene*, further legitimizing it. See *Gherebi v. Obama*, 609 F. Supp. 2d 43; *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.C. Cir. 2009); *Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.C. Cir. 2009).

Because Ahmed functions within the command structure of al Qaeda, an organization known to have orchestrated the 9/11 attacks, he is detainable as a participant in that organization. A practical inquiry for determining whether an individual is "part of" such organizations is "whether the individual functions or participates within or under the command structure

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include persons determined by a CSRT. *Boumediene* at 134 quoting 10 U.S.C. §948a.

of the organization- i.e., whether he receives and executes orders or directions." *Hamliily*, 616 F. Supp. 2d at 75. Ahmed is clearly within such a command structure. First, he agreed to volunteer to be an al Qaeda martyr or "do whatever else was asked of him." Second, he received al Qaeda training in order to execute his orders, and instructions regarding an assignment targeting the Social Security Administration. (*Id.*). Third, he was sent to us as a sleeper agent for al Qaeda, Finally, he took steps toward the execution of al Qaeda goals, like receiving new operatives, gathering information on chemical warfare, and receiving funding from the same financier as the facilitator of 9/11.

**C. Ahmed's Detention Is Constitutional Under The *Youngstown* Framework.**

To determine whether presidential action is constitutional courts look to the *Youngstown* framework. That is, "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 (Jackson, J., concurring). When the president acts without either a grant or denial, "he can only rely upon his own independent powers," and when he "takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb." *Id.*

Here, the President authorized Ahmed's detention pursuant to the power granted to him by congress under the AUMF, therefore he is acting with his maximum authority, and such detention is constitutional. *Id.* This conclusion is compelled by the plain language of the statute<sup>7</sup> and by Supreme Court precedent.<sup>8</sup> Congress explicitly authorized detention of Ahmed, who is in the exact position of the 9/11 operatives who planned and executed the attacks that the AUMF now responds to. Just like the 9/11 operatives, he was an operative in the United States, with domestic targets legally on U.S. soil. As with *Hamdi*, it is "no moment" that Congress did not use words describing detention of enemy operatives legally residing in the U.S. for Congress clearly meant to target such individuals. Because the president acts with express congressional approval, such acts are presumptively constitutional.

The Patriot Act<sup>9</sup> is not an expression of congressional will regarding the detainment of enemy combatants and therefore has no relevance within the *Youngstown* framework. A reading of the Patriot act, which limits the president's ability to detain those properly designated as enemy combatants pursuant to the

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<sup>7</sup> See Section I.

<sup>8</sup> See Section II and *Hamdi*: "Congress may constitutionally authorize the President to order the military detention, without criminal process, of persons who "qualify as 'enemy combatants,'" *Hamdi*, 542 U.S. at 516.

<sup>9</sup> Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Patriot Act).

AUMF conflicts with the language of the AUMF<sup>10</sup> and Supreme Court precedent in *Hamdi*. The Patriot Act, part of the immigration code, was designed to give law enforcement more means of preventing domestic terrorism generally, and is properly interpreted as governing "terrorist aliens," in general not enemy combatants in particular. See Patriot Act, Pub.L. No. 107-56, 115 Stat. 272 (2001); Also see *al-Marri* 534 F.3d at 302 (Wilkinson, J., concurring in part and dissenting in part. While the Patriot act gives power to the Attorney General as part of the executive power, the AUMF by granting necessary and appropriate authority for the use of force, refers to the president's commander in chief power. See *Ahmed*, No. 06-9701 at 13 note 2. In contrast to the Patriot Act, the AUMF was specifically enacted in response to the 9/11 attacks, and authorizes the executive alone, to use necessary means to address those organizations and associated persons responsible in order to prevent future acts.<sup>11</sup> Here, because Ahmed is properly designated as an "enemy combatant," the AUMF clearly governs.

Furthermore, the distinction between the nature of authority under the Patriot act and the AUMF are illustrated by their different processes. While the Patriot Act permits the Attorney General to "take into custody" any "terrorist aliens"

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<sup>10</sup> See Section I.

<sup>11</sup> See Section I.

based on his own belief, without judicial process or evidentiary hearing, and subsequently prescribes strict time limits including a ban on indefinite detention. Patriot Act § 412(a). Enemy combatant status, by contrast, requires at least that the government show "credible evidence," to support their assertion that an individual is an enemy combatant, which is rebuttable. *Hamdi*, 542 U.S. at 534.

The holding in *Ex Parte Milligan*, 71 U.S. 2 (1866), does not undermine the constitutionality of Ahmed's detention. That case stands for the proposition that, persons not "a part of or associated with the armed forces of the enemy," cannot constitutionally be held in military custody without charges or trial, and does not speak to those persons who are a part of or closely associated with the enemy. *Quirin*, 317 U.S. at 45, 63. Milligan was a resident of Indiana who had never been in military or naval service, whereas, Ahmed was a member of al Qaeda which the U.S. is currently at war with, and which Congress has authorized the president to use force against. In *Milligan*, Criminal court was appropriate precisely because Milligan was "in no wise connected with the military service." *Milligan*, 71 U.S. 2, 4. Whereas Ahmed was trained in an al Qaeda camp, acting as a sleeper agent in the United States and taking orders directly from al Qaeda, an organization which launched a violent strike on U.S. soil. Moreover, unlike the situation at

bar, Congress did not specify by name, the organization to which Milligan belonged and designate it as a target for which the president is authorized to use force. *See Milligan*, 71 U.S. 2. Given congressional authorization, Ahmed's detention is constitutional under *Youngstown*.

**II. THE LEVEL OF DUE PROCESS THE DISTRICT COURT AFFORDED PETITIONER BURHAN UDDIN AHMED IS CONSISTENT WITH THE FRAMEWORK SET FORTH IN THE SUPREME COURT CASE OF *HAMDI v. RUMSFELD* AS HE WAS PROVIDED NOTICE OF THE FACTUAL BASIS FOR HIS CLASS CLASSIFICATION AND A FAIR OPPORTUNITY TO REBUT THE GOVERNMENT'S FACTUAL ASSERTIONS BEFORE A NEUTRAL DECISIONMAKER.**

The Fifth Amendment to the United States Constitution states "No person shall be... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The petitioner, Mr. Burhan Uddin Ahmed now seeks to invoke this right as a mechanism of judicial review to challenge his designated status as an enemy combatant. The petitioner claims that the Government has violated his constitutional rights to due process, as he was not afforded a proper opportunity to challenge and rebut his classification as an enemy combatant. The Government strongly disagrees.

Holding dear the echoed values of this country, the Government recognizes that even during our Nation's most challenging of times, instances when our commitment to due process is most severely tested, we must hold steadfast to the

principles of our constitution. The type of due process to uphold this commitment is not uniform and can take many different forms, including the process the district court afforded Ahmed. The Petitioner, however, contends otherwise and argues that he has the right to process that is substantially equivalent what is afforded to criminal defendants. He is mistaken. Because Ahmed is classified as an enemy combatant, not a defendant in the criminal justice system, the process afforded to Ahmed must be consistent with the procedural framework set forth by the Court in *Hamdi v. Rumsfeld*, not with a civilian trial. 542 U.S. 507 (2004). With this, the Government respectfully asks that this Court find that Ahmed was afforded proper due process and reverse the Twelfth Circuit's en banc judgment as it relates to this specific issue.

The United States Supreme Court's plurality in *Hamdi* provided a cornerstone case in enemy combatant jurisprudence. Justice O'Connor's opinion provided essential guidance for district courts in the event that a case like Ahmed's comes before them.<sup>12</sup> Justice O'Connor first considered both parties' separate and significant competing interests as the Court does in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Weighing these

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<sup>12</sup> *Hamdi v. Rumsfeld* is a plurality opinion written by Justice O'Connor. Justice Souter and Ginsburg concur in part and dissent in part. They indicate that they would not disagree with the plurality's determination on the level of process owed to the detainee. *al-Marri*, 534 F.3d at n.5. Therefore *Hamdi*, as it relates to the due process framework, can be interpreted as a 6-3 majority opinion.

interests, the Court struck a constitutional balance by holding that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533.

When the district court heard Ahmed's case they properly considered and applied the *Hamdi* framework and afforded Ahmed the requisite level of due process.

**A. The Court of Appeals Misinterpreted *Hamdi* When Requiring The District Court To Consider The Location Of Ahmed's Capture.**

The location where United States authorities first seized Ahmed is insignificant when determining what level of due process the court afford him to challenge his enemy combatant status. When captured, Ahmed was a legal citizen residing in the United States. He was not in the battlefield abroad in the Middle East and was not seized by American soldiers. Instead he was at his home in East Dakota and taken into custody by the FBI. The Appeals Court strongly considered these differing circumstances and determined that location of the petitioner's seizure is relevant when determining what level of process the court should afford the detainee in hearing the his habeas petition. They base the majority of their opinion and their

critique of the district court's approach to hearing Ahmed's habeas petition by focusing on differences of the "circumstances of capture" between Ahmed and Hamdi's capture. *Ahmed*, No. 06-9702, at 22.. This approach and comparison, however, is improper and will provide misguidance to future proceedings.

In *Hamdi*, the Court addressed the location of the individual's detention when the Government contended that if the detainee is captured in a zone of active combat on foreign soil, he has effectively made a concession that eliminates his right to any right to further process to challenge his enemy combatant status. *Hamdi*, 542 U.S. at 526. The Court rejected this argument and effectively stated that regardless of the location of the detention, the individual has a right to challenge their designated status. *Id.* The Court narrowly addresses this issue of location as it relates specifically to the detainee's ability to rebut his enemy combatant status. They do not broaden their discussion of location to incorporate the appropriate level of due process afforded to the individual based where the United States authorities detained him. They, in effect, say the opposite. At the most, the court can consider location as one element of many when looking at the "exigencies of the circumstances" and the "potential burden placed on the Executive at a time of ongoing military conflict," but should not base their entire opinion on that one factor. *Id.* at 533.

Furthermore, even in the text of the AUMF, location is not a key aspect in initially detaining an individual. The "AUMF is in no way restricted to those persons who have fought or seen action on a foreign battlefield" and "contains no such location limitation and specifically states that its animating purpose is to "protect United States citizens both at *home* and *abroad*." *al-Marri*, 534 F.3d at 300 (Wilkinson, J., concurring in part and dissenting in part); AUMF, 115 Stat. 224 (emphasis added).

Considering the Court's ruling in *Hamdi* and the text of the AUMF, the Court of Appeals' determination that Ahmed has the right to more process than Hamdi because of the location of his detention is unfounded and, therefore, an inaccurate application of the *Hamdi* procedural framework.

**B. The Court of Appeals Misinterpreted *Hamdi* When Requiring The District Court To Provide An Explanation Before Considering The Murphy Declaration.**

The Appeals court found that the district court erred when automatically accepting the Murphy Declaration before considering the availability of alternative methods and demonstrating why limitations placed on traditional habeas procedures would be necessary. *Ahmed*, No. 06-9701, at 19. This requirement is does not comport with the procedural framework set forth in *Hamdi*.

In *Hamdi* the Court first discussed the Congressional history for submitting habeas petitions, 28 U.S.C. § 2241. *Hamdi*, 542 U.S. at 526. From the statute's simple outline, it is clear that Congress envisioned that petitioners could have some opportunity to present and rebut the Government's evidence and that courts would "retain some ability to vary the ways in which they do so as mandated by due process." *Id.* When considering the proper framework of due process in enemy combatant proceedings and Congress' vision for habeas petitioners, *Hamdi* created a non-traditional burden-shifting scheme and said that future courts may need to consider and accept hearsay evidence as the most reliable evidence from the Government in proceedings of this specific nature. *Id.* Therefore, once the Government puts forth reliable evidence, which can include hearsay documents like the Murphy Declaration, the burden shifts to the petitioner, here Ahmed, to rebut this evidence. The Court puts forth no more than this skeletal burden shifting and evidentiary framework. *Id.* at 525. Therefore, while the Appeals Court contends that the district court erred when it did not demonstrate that the Declaration is the most reliable evidence or that additional procedural protections would unduly burden the Government, *Hamdi* does not call for this explanation.

Furthermore, as the Appeals court highlights, the district courts retain the authority to weigh the interests of the parties and structure the proceedings in a way that will be consistent as they see fit. *Ahmed*, No. 06-9701, at 23. Requiring them to justify why the offered hearsay is the most reliable evidence in every case would deny them this authority and flexibility to individually determine how to proceed forward and what procedures would be proper in the particular case before them. *Hamdi*, 542 U.S. at 533. To be clear, the Court simply states that the circumstances may demand that hearsay documents be admitted but *does not* say that prior to their introduction in trial, the district court must provide a specific reason or justification for considering the Declaration or other hearsay document.

**C. The Murphy Declaration Provides Ample Notice To Ahmed To Effectively Produce Rebuttal Evidence For His Defense.**

The Murphy Declaration provides ample notice to Ahmed to effectively produce rebuttal evidence for his defense. *Hamdi* requires that the detainee have a fair opportunity to rebut the charges before him, and have notice of what grounds he has been labeled as an enemy combatant. *Hamdi*, 542 U.S. at 533. Furthermore *Hamdi* requires that the Government meet this initial burden by having a "knowledgeable affiant" provide a "summa[y]" of "records to an independent tribunal." *Id* at 534. Once the

Government produces this requisite notice, they satisfy their burden to set forth meaningful support for concluding that the detainee is an enemy combatant. *Id.*

John R. Murphy, the director for the Joint Intelligence Task Force for Combating Terrorism, prepared the Declaration and unequivocally qualifies as a knowledgeable affiant. In his document he sets forth multiple summary points relating to five different categories. First, Murphy provided background on Ahmed's relationship with al Qaeda detailing his background and training and his specific al Qaeda activities. Then Murphy summarized what evidence authorities found on his laptop computer, what specific telephone conversations revealed about Ahmed's terrorist activities, and lastly about Ahmed's possession of stolen social security card information. Ahmed could elect any one of the five categories to defend himself against as each qualifies as sufficient notice, and provides him with a sufficient opportunity to rebut.

In the *In re Guantanamo Detainee Cases*, Judge Green highlights some of the issues that can arise when the required notice is *not* given to a petitioner. 355 F. Supp. 2d 443 (D.C. Cir. 2005). The Judge highlights this by using part of a transcript from *Boumediene*, where a petitioner attempts to defend himself against his classification as an enemy combatant. *Id.* He is first accused of being associated with a known al

Qaeda operative. *Id.* at 468-69. In response the detainee asked for the operative's name. *Id.* The name was not given and the detainee then states that if he was told the specific name then he could respond properly but generalizations will not allow him to "respond and defend [him]self against this accusation." *Id.*

The Murphy Declaration does not present these issues. Among other specific points, it identifies specific individuals whom Ahmed has allegedly associated with. For example, in the section discussing Ahmed's background and training, the Declaration states he "cultivated relationships with senior al Qaeda leaders, including Osama Bin Laden and Khalid Sheikh Muhammad. Another example of the Murphy Declaration's specificity is the detail in which they explain why they suspected Ahmed to have been inquiring about bombs. The Declaration does not say generally that they gathered information about Ahmed's inquiry about bombs, but instead, states specifically where they found the information, on his laptop, and what his research specifically regarded, using chemicals as weapons of mass destruction.

Moreover, comparing the Murphy Declaration against the Mobbs Declaration in *Hamdi*, it is evident that Murphy provided much more detail into the cause for detention and enemy combatant classification than Mobbs. The Mobbs Declaration arguably falls short of meeting the requisite notice as required

in *Hamdi* and echoes the same issue highlighted by Judge Green. It does not provide specific names of individuals Hamdi associated with nor does it specifically state the location or source from which they gathered evidence of Hamdi's terrorist activities. However, with the lack of specific information and details, the *Hamdi* Court still says that the Mobbs Declaration is sufficient in particular circumstances. *Hamdi*, 542 U.S. at 533.

Therefore, comparing the Mobbs Declaration with the Murphy Declaration and considering the differences of the specificity, this Court should find that the Declaration provided Ahmed with ample notice to fairly rebut his status as an enemy combatant.

**D. It is Improper To compare The Risk Of Erroneous Deprivation Of An Enemy Combatant Proceeding To A Proceeding In The Criminal Justice System.**

The Appeals Court should not base their judgment of what evidentiary rules and procedural guidelines are appropriate in this case by comparing enemy combatant proceedings to traditional criminal trials. The Appeals Court found that the risk for erroneous deprivation is much greater in Ahmed's case than in Hamdi's because not only was he captured within the United States by civilian authorities, but the authorities also do not have to adhere to the protocol of criminal procedure. *Ahmed*, No. 06-9701, at 21. This comparison lent guidance and

motivation for the rest of the court's opinion. this focus, however, is misplaced.

The Court *Hamdi* specifically stated that in enemy combatant proceedings traditional rules of criminal proceeding may not be proper. *Hamdi*, 542 U.S. at 533. The Court said that hearsay can be admitted, a favorable presumption for the Government's evidence can exist, and there is a burden-shifting scheme that passes from the Government to the petitioner. *Id.* With this, the Court took significant steps away from traditional criminal procedure and structured a process that is much different in approach, rationale, and underlying policy. Therefore, because enemy combatant proceedings "need not resemble a criminal trial," to compare levels of due process and the probability for deprivation of liberty of Ahmed with a defendant in the criminal justice system is improper. *Boumediene*, 128 S. Ct. at 2275.

**E. The Court Should Not Afford Ahmed Another Opportunity To Produce Rebuttal Evidence As He Was Given Ample Opportunity to Prepare A Defense But Elected To Not Actively Participate In The Proceeding.**

One of the large differences between *Hamdi's* due process framework and a traditional civilian criminal trial is that the Government enjoys a favorable rebuttable presumption. *Hamdi*, 542 U.S. at 534. When the Government presented the Murphy Declaration as their evidence for classifying Ahmed as an enemy combatant, they were afforded this presumption wherein the

burden then shifted to the detainee, Ahmed, to present evidence that would be "more persuasive." *Id.* Ahmed was provided ample time, 60 days, to gather and arrange rebuttal evidence after being presented with the Murphy Declaration. However, instead of procuring evidence on behalf of his defense, he elected to respond with a general denial.

In all, the district court was proper in not providing a justification for accepting the Murphy Declaration as the Government's form of evidence and that the Declaration provided Ahmed with ample notice of the reasoning for his enemy combatant classification. Furthermore it is evidence that Ahmed was afforded a fair opportunity to rebut the charges even though he elected to not actively produce rebuttal evidence in his defense. Therefore, this Court should find in favor of the Government and hold that the process afforded to Ahmed was consistent with the requirements as set forth by *Hamdi*, thus reversing the Twelfth Circuit Court of Appeal's opinion as it relates to this issue.

#### **CONCLUSION**

For the aforementioned reasons we respectfully request the Court: 1) Affirm the Twelfth Circuit's holding that the AUMF authorizes Ahmed's detention for the duration of the hostilities between the United States and al Qaeda; and 2) reverse the

Twelfth Circuit Court's finding that Ahmed was afforded insufficient process to challenge his enemy combatant status.