

No. 08-11144

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**In the Supreme Court of the United States**

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BURHAN UDDIN AHMED,  
PETITIONER,

v.

UNITED STATES OF AMERICA,  
RESPONDENT.

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

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BRIEF FOR RESPONDENT

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Team 2567  
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January 15, 2010

AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY  
CONSTANCE BAKER MOTLEY 2010 NATIONAL MOOT COURT COMPETITION IN  
CONSTITUTIONAL LAW

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**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 with al Qaeda to engage in terrorist activities?

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

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The decision of the United States Court of Appeals for the Twelfth Circuit Docket No. 06-9701 is unreported, and is set forth in the Record at pages 5 through 46. The decision of the United States District Court is unreported.

**JURISDICTION**

The judgment of the United States Court of Appeals for the Twelfth Circuit was entered on November 24, 2008. This Court granted the petition for a writ of certiorari on October 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

**RELEVANT PROVISIONS**

U.S. CONST. ART. II, SECT. 2

U.S. CONST. AMEND. V

AUTHORIZATION FOR USE OF MILITARY FORCE, PUB. L. No. 107-40, 115 STAT. 224 (2001) (AUMF)

28 U.S.C § 2241: Power to Grant Writ

28 U.S.C § 2243: Issuance of Writ; Return; Hearing; Decision

28 U.S.C § 2246: Evidence; Depositions; Affidavits

**STATEMENT OF THE CASE**

## I. Origins of Present Dispute

On September 8, 2001 Burhan Uddin Ahmed, a citizen of Pakistan, entered the United States lawfully with his family to pursue a doctor of veterinary medicine degree at Wilson University in Wilson, East Dakota. Record 7. On September 11, 2001, the al Qaeda terrorist network hijacked American commercial airliners and used them as guided missiles to attack prominent targets in the United States. Record 6. Many Americans perished in these attacks and Congress responded, a week later, by passing the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF). Record 6. Among other things, the AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11, 2001 terrorist attacks on the United States. Record 6.

Four months later, on January 3, 2002, federal agents arrested Ahmed in Wilson as a material witness in the government's ongoing investigation of the September 11th attacks. Record 7. Ahmed was detained in Wilson. Record 7. In November 2002, Ahmed was charged in the District of East Dakota with the possession of counterfeit Social Security cards with

the intent to defraud. Record 7. In January 2003, Ahmed was further charged with making a false statement to the Federal Bureau of Investigations (FBI). Record 7. Ahmed pleaded not guilty to all charges. Record 7.

A trial date was set in the District of East District for July 17, 2003. Record 7. On June 9, 2003, the court scheduled a hearing for June 15, 2003 on all pretrial motions, including a motion to suppress evidence that Ahmed asserted was obtained by torture. Record 7. Before the hearing took place, the government filed an ex parte motion on June 13, 2003 to dismiss the indictment based on an order signed that morning by the President of the United States. Record 7.

In that order, the President ordered the Attorney General to surrender Ahmed to the Secretary of Defense, who would then detain Ahmed as an enemy combatant. Record 7. The President's order stated that he had "DETERMINED for the United States of America that" that Ahmed: (1) is an enemy combatant; (2) is closely associated with al Qaeda; (3) "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism"; (4) "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda"; and (5) "represents a continuing, present, and grave danger to the national security of the United States." Record 7. The President further determined that Ahmed's detention by

the military was "necessary to prevent him from aiding al Qaeda." Record 7.

The District of East Dakota granted the government's motion to dismiss the criminal indictment against Ahmed. Record 7. Ahmed was transferred into military custody and brought to the Army Regional Consolidated Detention Facility in Souds, East Dakota. Record 8. The military has held Ahmed as an enemy combatant without charge or trial. Record 8.

## II. Procedural Posture

Ahmed filed a petition for writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241 to secure his release from military detention. Ahmed asserted that his detention as an enemy combatant was unlawful. Record 8. Ahmed demanded that the government was required to either file criminal charges against him or release him. Record 8. Ahmed also petitioned that if the government was not going to file criminal charges against him or release him, that he must be afforded a hearing to challenge the factual basis for his designation as an enemy combatant. Record 8.

In response to Ahmed's petition, the government claimed that Ahmed is an al Qaeda affiliate who "prepar[ed] for acts of international terrorism" and therefore should not be released. Record 8. The government also asserted that the President has

both statutory authority under the AUMF and inherent constitutional authority to indefinitely detain Ahmed or anyone else that associates with al Qaeda and "prepare[s]" for terrorist acts. Record 8. In response to Ahmed's petition for a hearing, the government asserted that Ahmed was given adequate process to challenge his detention as an enemy combatant. Record 8.

As supporting evidence for the detention of Ahmed as an enemy combatant, the government provided the court with the Declaration of John R. Murphy (Murphy Declaration). Record 8. John R. Murphy is the Director of the Joint Task Force for Combating Terrorism and in his declaration provided hearsay evidence of Ahmed's involvement with al Qaeda. Record 8. In his declaration, Murphy reviewed the intelligence gathered by the government suggesting that Ahmed (1) was an operative of al Qaeda acting as a sleeper agent within the United States; (2) had been trained in a terrorist training camp in Afghanistan; (3) had communicated with Osama Bin Laden and was aided by other known high-ranking members of al Qaeda; (4) entered the United States with the intent to commit terrorist attacks within the country; and (5) possesses highly valuable intelligence about al Qaeda. Record 8-9.

The district court held that the Ahmed could be detained as an enemy combatant, but found that he was entitled to challenge

the factual basis of his detention at a hearing consistent with his procedural due process rights. Record 9. The district court sent the case to a magistrate judge to determine the process that Ahmed must be afforded. Record 9. The magistrate judge rejected Ahmed's argument that he had a right to procedural safeguards substantially equivalent to those received by criminal defendants. Record 9. The magistrate judge held that the government must provide Ahmed with notice of the factual basis of his detention. Record 9. If the government produces credible evidence to support Ahmed's detention as an enemy combatant, Ahmed then shoulders the burden to refute that designation with more persuasive evidence. Record 9. Finally, if Ahmed produces the requisite evidence, the government must then either release him or agree to a full adversarial hearing that would include more robust procedural safeguards. Record 9.

Within the parameters of this holding, and in consideration of the Murphy Declaration, the magistrate judge concluded that Ahmed was provided with adequate notice of the factual basis for his detention. Record 9. The judge also held that the government offered sufficient evidence indicating the Ahmed was an enemy combatant in order to place the burden on Ahmed to refute that designation with more persuasive evidence. Record 9. The magistrate judge gave Ahmed sixty (60) days to refute the government's evidence. Record 9.

Ahmed's response to the government's evidence was a general denial. Record 9. Ahmed asserted that he was not an enemy combatant, but did not offer any evidence to rebut the Murphy Declaration. Record 9. Based on Ahmed's refusal to present evidence in his defense, the magistrate judge recommended that his petition for a writ of habeas corpus be dismissed. Record 10. The district court agreed and dismissed Ahmed's petition. Record 10.

Ahmed appealed the district court's decision. Record 10. A panel for the United States Court of Appeals for the Twelfth Circuit affirmed the district court's decision. Record 10. Ahmed motioned for a rehearing and the court voted to vacate the panel opinion and hear the case en banc. Record 10.

The Court of Appeals held that, if the government's allegations are true, the President was authorized by the AUMF, the Constitution and Supreme Court precedent to detain Ahmed as an enemy combatant. Record 28. The Court of Appeals rejected the government's argument that Ahmed was given adequate process to challenge his detention as an enemy combatant. Record 28. The court held that Ahmed, as a legal resident detained in the United States, had not been afforded sufficient process to challenge his designation as mandated by the Fifth Amendment and reversed and remanded the case to the district court. Record 28.

**SUMMARY OF ARGUMENT**

The Court of Appeals erred in reversing the district court decision to dismiss Petitioner's habeas corpus petition.

Article II of the Constitution gives the President the power to act as Commander-in-Chief in times of war. U.S. Const. art. II, § 2. Congress endorsed the President's inherent constitutional powers with the passage of the Authorization for Use of Military Force (AUMF) on September 18, 2001. The AUMF authorizes the President to use "all necessary and appropriate force" against the al Qaeda forces responsible for the September 11th attacks. AUMF, 115 Stat. 224.

The President's power to detain those designated as enemy combatants is authorized by the AUMF. AUMF, 115 Stat. 224. As a supporter of an al Qaeda operation, Petitioner falls within the definition of enemy combatant. Therefore, the President is allowed to detain Petitioner indefinitely. There is no language in the AUMF that would support Petitioner's assertion that the AUMF does not include the right to detain. To allow the President the extensive jurisdiction of using all force necessary and appropriate to handle military matters and potential foreign threats, but not allow him the authority to detain those he designates as enemy combatants is counter-intuitive. Furthermore, the need to contain and prevent enemy

combatants from further assisting in anti-American attacks is paramount.

Petitioner's status as a lawful resident does not have any bearing in the President's power to detain. The holding in *Ex Parte Quirin*, 317 U.S. 1 (1942) in particular, makes it abundantly clear that United States citizenship does not mitigate an enemy combatant's culpability under the law.

Petitioner was afforded the same due process as decided in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Petitioner is not entitled to more process than what the *Hamdi* decision laid out. The *Hamdi* plurality noted that when a detainee files a writ of habeas corpus to challenge his detainment, the detainee must (1) "receive notice of the factual basis for his classification;" (2) be given "a fair opportunity to rebut the Government's factual assertions;" and (3) be given a hearing by a "neutral decision maker." *Id.* at 533.

The district court procedures afforded to Petitioner were consistent with Fifth Amendment due process requirements. First, the government offered the Murphy Declaration as a notice of the factual basis for his designation as an enemy combatant. Second, Petitioner was given a fair opportunity to rebut the Government's factual assertions. Finally, Petitioner's habeas corpus proceedings were presided over by the district court.

Finally, the *Hamdi* decision makes no distinction regarding the location of the detainee's capture and therefore it would have no bearing on Petitioner's due process rights.

#### ARGUMENT

**I. THE AUTHORIZATION FOR USE OF MILITARY FORCE, PUB. L. NO. 107-40, 115 STAT. 224 (2001) (AUMF) AUTHORIZES AND THE CONSTITUTION ALLOWS THE PRESIDENT TO SEIZE AND DETAIN INDEFINITELY, A LAWFUL PERSON RESIDING IN THE UNITED STATES, WITHOUT A CRIMINAL CHARGE OR TRIAL, BASED ON THE GOVERNMENT'S DESIGNATION OF THE DETAINEE AS AN "ENEMY COMBATANT."**

**A. The AUMF authorizes the President to seize and detain Ahmed indefinitely based on his designation as an enemy combatant and is a fundamental and accepted practice under the AUMF.**

The United States Court of Appeals for the Twelfth Circuit correctly decided and the government asserts that the Presidential power to detain indefinitely, without criminal charge or trial, an individual who has been designated an enemy combatant is consistent with the intent of Congress' passing of the AUMF and inherent in the President's constitutional authority as described in Article II, section 2. Record 28. This power allows the President broad delegation and makes available to him different mechanisms for managing threats to this country's safety. Without the full extent of this authority, the President would be powerless to protect American citizens. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

The al Qaeda terrorist network planned and organized the tragic attacks executed against the United States on September 11, 2001. Record 6. Nearly three thousand (3,000) people were killed as a result of al Qaeda's deliberate and premeditated violence on the citizens of the United States. Record 6. The acts of terrorism by al Qaeda initiated the President's Commander-in-Chief power to introduce United States Armed Forces into hostilities as sanctioned by the War Powers Resolution. 50 U.S.C. § 1541(c). On September 18, 2001, and in direct response to the al Qaeda terrorist attacks, Congress passed the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF). The passage of the AUMF further supported the President's Commander-in-Chief powers as it satisfies the requirement for specific statutory authorization. 50 U.S.C. § 1541(b).

The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks 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." AUMF, 115 Stat. 224. Contrary to Petitioner's position, there is no language in the AUMF that would intimate that it was the intent of Congress to

allow the President extensive discretion in battling al Qaeda, on foreign and domestic battlefields, while at the same time limiting the Presidential power to detain those who are captured and designated as enemy combatants.<sup>1</sup> Essentially, to do so would negate the very power Congress intended to grant. When the President decided to detain Petitioner, he did so with the authorization of the AUMF. It is firmly rooted in American jurisprudence that "when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).<sup>2</sup>

This Court initially considered the scope of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Hamdi was captured in Afghanistan by the Afghan Northern Alliance in 2001 and then turned over to United States military authorities for allegedly

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<sup>1</sup> There is no explicit language in the AUMF regarding the President's authority to detain individuals designated as enemy combatants. However, the AUMF specifically authorizes the President to "use all necessary and appropriate force" against individuals, organizations and nations that he determines assisted in the terrorist attacks on September 11, 2001. The authority to use the maximum military force against all terrorist would also denote the authority to detain any captured terrorist. While detention is not explicitly authorized in the AUMF, the power to detain stems from the President's authority to use all necessary military force against individuals involved or assisting in terrorist acts.

<sup>2</sup> While the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) held, in a 6-to-3 decision, that the President did not have the authority to issue an executive order directing the Secretary of Commerce to seize and operate most of the nation's steel mills, the Court did so with the rationale that there was no Congressional statute that authorized the President to take possession of private property. See also *Dames & Moore v. Reagan*, 452 U.S. 654 (1981).

fighting for the Taliban. *Id.* at 510. Hamdi was held at Guantanamo Bay at which point it was discovered that he was a United States citizen and was transferred to a military base in South Carolina. *Id.* The Bush administration designated him an enemy combatant and after which he could be held in the United States indefinitely, without formal charges or proceedings. *Id.*

This Court held that “[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.” *Id.* at 518. Justice O’Conner noted that detaining individuals who have supported al Qaeda, for the duration of the particular conflict in which they were captured, “is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.*

This Court understands as Congress did by the passage of the AUMF, the importance of preventing future violent acts by the detainee and the need to permit the use of all necessary and appropriate force to achieve that goal. This Court’s holding in *Hamdi* noted that the “object of capture is to prevent the captured individual from serving the enemy.” *Id.* (quoting *In re Territo*, 156 F.2d 142, 145 (1946)). Hamdi, like Petitioner,

supported hostile al Qaeda forces whose goal was nothing less than to cause terror and commit acts of unspeakable violence on American soil. For this reason, Petitioner unmistakably was rightly designated as an enemy combatant and the President had full authority to detain him.

*Hamdi* set a firm precedent in cases of this nature by acknowledging the authority of the President to detain enemy combatants under the AUMF. The Fourth Circuit in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) also analyzed the scope of the AUMF and came to the same conclusion as in *Hamdi*. The Fourth Circuit held that just “[a]s the AUMF authorized Hamdi’s detention by the President, so also does it authorize Padilla’s detention.” *Id.* at 391. Like Hamdi, Padilla argued that his indefinite detention by the President violated the Constitution. *Id.* at 390. Padilla was closely associated with al Qaeda and because of his association, the President rightfully designated him as an enemy combatant. *Id.* The court held that “because his detention is no less necessary than was Hamdi’s [and] in order to prevent his return to the battlefield, the President was authorized by the AUMF to detain Padilla as a fundamental incident to the conduct of war.” *Id.* at 392.

The Court’s conclusion in *Hamdi* and *Padilla* is reinforced by the Court’s holding in *Ex parte Quirin*, 317 U.S. 1 (1942). The *Quirin* decision soundly established that individuals that

"associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents." *Id.* at 37-38. The *Hamdi* and *Padilla* decisions relied on *Quirin's* definition of enemy belligerents and equated that to enemy combatants. When the Court is confronted with an individual who has "associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies and who enter[s] the United States for the avowed purpose of further prosecuting that war by attacking American citizens", there is no uncertainty that those actions authorize designation as an enemy combatant. *Padilla*, 423 F.3d at 397.

The *Hamdi* and *Padilla* court determined, based on *Quirin* that the detainees in these cases could be designated as enemy combatants and therefore could be detained indefinitely. See generally *Hamdi*, 542 U.S. 507 (2004); *Padilla*, 423 F.3d 386 (4th Cir. 2005). Petitioner falls within the *Quirin* definition and was properly designated as an enemy combatant. However Petitioner argues that *Hamdi* and *Padilla* cannot be applied to the facts of his case. Petitioner argues that the AUMF does not include an authorization for the President to deal militarily with al Qaeda operatives. Record 15. Petitioner therefore argues that the President lacks legal authority to designate him as an enemy combatant and detain him indefinitely. Record 10.

Petitioner asserts that al Qaeda is an international terrorist organization not an enemy government. He argues that the AUMF does not apply and therefore the *Hamdi*, *Padilla*, and *Quirin* decisions have no precedential effect on the facts of his case. Record 15. While Petitioner's facts are distinguished from *Hamdi* and *Padilla* in that he did not engage in combat operations against the United States on a foreign battlefield, it is clear that the attackers, who entered this country under the orders and in support of al Qaeda, did so with the purpose of waging war. Record 14. Al Qaeda clearly and definitively declared war on this country when it hijacked American commercial airliners and used them to attack prominent targets in the United States. The fact that al Qaeda is not a nation state in the traditional sense is an insignificant distinction that has no bearing on the actions that were taken against the United States by al Qaeda. *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

The attacks waged on this country on September 11, 2001 are no less devastating than acts waged by enemy governments against the United States in the past.<sup>3</sup> Al Qaeda members have

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<sup>3</sup> For example, the bombing of Pearl Harbor of the morning of December 7, 1942, which resulted in the entry of the United States in World War II, can be likened to the actions of al Qaeda on September 11, 2001. While Pearl Harbor was the result of an enemy strike by the Japanese navy, the loss of life, the unsuspected nature of the attack, and the response from the legislative and executive branches of the government share similarities with the al Qaeda terrorist attacks.

infiltrated our borders, committed war-like acts, targeted American citizens and military installations and are similar to enemies that the United States have confronted in the past. Record 16. The actions of al Qaeda are hostile in nature and consistent with those described in *Quirin*. *Quirin*, 317 U.S. at 38.

Given the impetus for the passage of the AUMF, there is little support to suggest that Congress intended the President's authority to detain enemy combatants only to extend to those captured from a foreign nation. The AUMF unmistakably authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." AUMF, 115 Stat. 224 This must include the detention of al Qaeda operatives like Petitioner and there should be no distinction regarding detainment based on al Qaeda's status as a enemy government. While the circumstances surrounding Petitioner's detention differ from the detainees in *Hamdi* and *Padilla*, Petitioner's association and support of al Qaeda and al Qaeda's targeted attacks on the United States fully and unequivocally authorize the President to do all necessary to protect American citizens against him.

**B. The President has the unencumbered, inherent Constitutional authority to protect American citizens from foreign threat, which includes the right to detain an individual that is determined to be an enemy combatant indefinitely.**

Article II, Section 2 of the Constitution states that the President "shall be commander in chief of the Army and Navy of the United States." U.S. Const. art. II, § 2. In times of war, the Constitution provides a basis for the President's actions. *Hirabayashi v. United States*, 320 U.S. 93 (1943). The President has the "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." AUMF, 115 Stat. 224. The President's powers "embrace every phase of the national defense" and "extend to every matter and activity so related to war as substantially to affect its conduct and progress." *Hirabayashi*, 320 U.S. at 93.

Military detention has been seen as an inevitable part of war. *Hamdi*, 542 U.S. at 519. The Constitution affords the President the ability to provide this country with the greatest protection against foreign threat by allowing his discretion in declaring an individual associating with a network organization that has undertaken acts of war against the United States as an enemy combatant. *Id.* The President is allowed this responsibility largely free of encumbrances and review. See generally *Ex parte Quirin*, 317 U.S. 1 (1942).

Furthermore, the President is seen to be acting at the height of his presidential power when he is acting in concert with Congress. See *Youngstown Sheet & Tube Co. v. Sawyer*, 434 U.S. 579 (1952). Congress granted the President the power to use "all necessary and appropriate force" to prevent future acts of terrorism and violence against the United States. AUMF, 115 Stat. 224. In doing so, Congress most certainly would have contemplated that the President's use of force would include the detention of individuals that enter this country with the sole purpose of attacking the United States. The President would need the authority to handle these sensitive matters of national security.

This conclusion is reinforced by the long-standing deference that the executive branch receives during times of war. The judiciary has been reluctant to second guess the actions of military and national security affairs. See generally *Ex parte Quirin*, 317 U.S. 1 (1942). More specifically, this Court held in *Quirin*, that the judiciary cannot interfere in the Executive Branch's decision to detain enemy combatants "without clear conviction that they are in conflict with the Constitution...." *Id.* at 25.

Petitioner would have this Court disturb a long-standing judicial precedent allowing the President great latitude in military affairs as well as ignore the Constitutional provisions

that have been called upon many times during times of war. Petitioner asks this Court not only to second guess the military actions of the President as he performs his role as Commander-in-Chief, but also to intervene in Congress' delegation of power to the President. A disruption in this country's political framework is not justified, nor has Petitioner presented a compelling argument to warrant it.

**II. The District Court provided the Respondent with sufficient process to challenge his designation as an "enemy combatant" as provided by the Fifth Amendment and as set forth by the United State Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).**

Habeas corpus proceedings are available to all detained U.S. Citizens unless otherwise suspended by Congress. U.S. Const. art. I, § 9, cl. 2. Petitioner was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241 (2006). Once a federal court has received a writ of habeas corpus, the court can "award the writ or issue an order directing the respondent to show cause why the writ should not be granted." *Id.* § 2243. This section also allows the detainee to "under oath, deny any of the facts set forth in the return or allege any other material facts." *Id.* All evidence taken during an habeas corpus writ can be taken by "deposition, affidavit, or interrogatories." *Hamdi*, 542 U.S. at 525 (citing 28 U.S.C. § 2246). Nowhere in the Record does it mention that Congress suspended Petitioner's right to bring a habeas proceeding.

Petitioner argues that he was not provided "with a fair opportunity to rebut the charges against him" because the district court relied on hearsay evidence and "forced him to produce evidence to prove his own innocence . . . ." Record 19. During a normal criminal proceeding, a defendant does not have to prove his innocence because the burden is on the government to present evidence beyond a reasonable doubt that Defendant is guilty of the crimes charged against him. Here Petitioner's "actions were not those of a common criminal who was intending to commit [a] criminal act for personal gain." Record 19. The Petitioner was declared an enemy combatant by the President of the United States on June 13, 2003. Record 7. Therefore the innocent until proven guilty maxim, which requires the government to prove guilt, does not apply because precedent in habeas corpus matters afford the detainee the opportunity to challenge his "enemy combatant" classification.

**A. The District Court correctly applied the *Hamdi* precedent to allow the Petitioner the opportunity to refute his designation as an enemy combatant in a habeas corpus proceedings.**

In *Hamdi*, this Court had to determine, *inter alia*, "what process is constitutionally due to a citizen who disputes his enemy-combatant status." *Hamdi*, 542 U.S. at 524. *Hamdi*'s father filed a writ of habeas corpus challenging his son's enemy combatant designation. *Id.* at 510. The government provided the

district court with a copy of a declaration by Micheal Mobbs, who was the Special Advisor under the Secretary of Defense for Policy to support Hamdi's enemy combatant designation. *Id.* at 512. The government argued that the Mobbs Declaration was sufficient evidence to support its determination that Hamdi was an enemy combatant. *Id.* at 527. Hamdi countered by arguing "due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counterevidence." *Id.* at 528.

This Court balanced the interests of Hamdi and the government and held that a person designated 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 decision-maker." *Id.* at 533. The United States Court of Appeals for the Fourth Circuit's decision was vacated because Hamdi "received no process." *Id.* at 537, 539. The case at bar differs drastically because Petitioner was provided with factual notice of his declaration, and fair opportunity to rebut the factual assertions before a neutral decision maker.

1. *Balancing the Government's and Petitioner's interest using the Mathews v. Eldridge, 424 U.S. 319 (1976) balancing test.*

This Court in *Mathews v. Eldridge* created a three-part balancing test to weigh the competing interest of the government

and the detainee to determine whether a person has received his or her due process under the Fifth Amendment of the Constitution. The Court used this balancing test to “ensure that a citizen is not ‘deprived of life, liberty, or property without due process of law . . . .’” *Hamdi*, 542 U.S. at 529 (quoting U.S. Const. amend. V.). The test requires the Court to determine:

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.

*Mathews*, 424 U.S. at 335.

Petitioner's interest is to be “free from physical detention by one's own government.” *Hamdi*, 542 U.S. at 529. The Court in *Hamdi* noted that this interest could not be “offset [by] the circumstances of war or the accusation of treasonous behavior . . . .” *Id.* at 530. Because, the Government's interests are to protect the United States and its citizens from terrorist acts, “detain those who actually pose an immediate threat to the national security of the United States during ongoing international conflict” *Hamdi*, 542 U.S. at 530; and 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.

2. *The Murphy Declaration served as the Petitioner’s notice as of the factual basis for his enemy combatant classification.*

The district court held that Petitioner was an enemy combatant, by information that it received in a hearsay document, the Declaration of John R. Murphy (Murphy Declaration). Record 9. Mr. Murphy served as the Director of the Joint Intelligence Task Force for Combating Terrorism. Record 8. The Murphy Declaration provides in detail reasons as to why Petitioner was declared an enemy combatant. These details include evidence regarding the Petitioner’s background and training; his activities with al Qaeda; his computer records; telephone records; and evidence of stolen Social Security numbers. Record 47-48.

The *Hamdi* Court did not create guidelines as to what types of evidence would be more reliable than others. *Hamdi*, 542 U.S. at 534. The Court did not establish rigid evidentiary guidelines because the Court recognized that these types of “enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive.” *Id.* at 533. The Court realized that under certain circumstances hearsay documents may be “the most reliable available evidence.” *Id.* at 534. The Court also stated that “a habeas court . . . may

accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return." *Id.* at 538.

3. *The Petitioner was afforded the opportunity to rebut the Government's assertion before a neutral decision maker.*

Furthermore, the Court noted that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Id.* at 534. The Court stated that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Id.* at 537. Even though the district court found that Petitioner "could be detained as an enemy combatant," it also found that "he was entitled to challenge the factual basis of his detention at a hearing consistent with his procedural due process rights." Record 9.

Petitioner was given ample opportunity to refute the claims made in the Murphy Declaration. The magistrate judge, who "determined the process that [the Petitioner] must be afforded," provided the Petitioner with 60 days to rebut the hearsay evidence in the Murphy Declaration. Record 9. Instead of

refuting the evidence "with more persuasive evidence that he falls outside the [enemy combatant] criteria" *Hamdi*, 542 U.S. at 34, Petitioner "responded with a general denial . . . that he was not an enemy combatant . . . ." Record 9.

In addition, a key difference that the dissent correctly pointed out, is that the "Murphy Declaration offered by the government against Petitioner, [is] more detailed and thorough in its explanation of the factual basis for Petitioner's detention than the Mobbs declaration." Record 45. Therefore, if this Court found Hamdi's access to due process provisions under the Mobbs Declaration consistent with Fifth Amendment requirements, Petitioner's access should be held to be the same.

**B. The location of capture is not a relevant aspect when considering the sufficiency of due process rights of a detainee.**

Petitioner is a Pakistani citizen who entered the United States legally two days before the September 11, 2001 attacks, to "pursue a doctorate in veterinary medicine at Wilson University in Wilson, East Dakota."<sup>4</sup> Record 7. On January 3, 2002, Petitioner was arrested "as a material witness" in the 9/11 attacks. Record 7.

The United States Court of Appeals for the Twelfth Circuit held that Petitioner was not afforded due process rights by the

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<sup>4</sup> According to the Murphy Declaration, the Petitioner was failing out of the doctorate program because of his excessive absenteeism. Murphy Declaration, Record 47.

district court, in part, because of where the Petitioner was captured. Record 26. The Twelfth Circuit incorrectly reasoned that Petitioner's capture on American soil instead of on a foreign battlefield, like Hamdi, changes the procedural safeguards that an enemy combatant is due. Record 26. Furthermore, the court believed that "courts should not rigidly impose [the *Hamdi*] process when faced with a detainee who was captured as [the Petitioner] was." Record 26.

The Supreme Court in *Hamdi*, stated that "a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved." *Hamdi*, 542 U.S. at 538. The *Hamdi* Court does not state, infer or hypothesize, why a non-United States citizen arrested on American soil would change or should be afforded more procedural safeguards than Hamdi. The location of the capture has no bearing on a detainee's due process rights.

#### **CONCLUSION**

For the reasons set forth above, the Respondent respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Twelfth Circuit and dismiss Petitioner's habeas corpus petition.

APPENDIXU.S. CONST. ART. II, SECT. 2:

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

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.

28 U.S.C § 2241: Power to Grant Writ:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the

district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 ([10 U.S.C. 801 note](#) ), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C § 2243: Issuance of Writ; Return; Hearing; Decision:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be

required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C § 2246: Evidence; depositions; affidavits:

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.