

No. 08-11144

In the Supreme Court of the United States

BURHAN UDDIN AHMED,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENTS

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

BRIEF FOR RESPONDENT

*Counsel for respondent
Team # 2589*

Questions Presented

1. Whether the Authorization for Military 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?

OPINIONS BELOW

The opinion of the Court of Appeals and the District Court is Unreported but is contained in the Record.

JURISDICTION

The petition for writ of certiorari was filed on October 2, 2009. This Court has jurisdiction pursuant to 28 U.S.C 1254(b).

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Statement of the Facts

On September 11, 2001, a series of well-organized and devastating terrorist attacks were launched against the United State by the al Qaeda terrorist network, killing nearly 3000 innocent American civilians. The government's response was swift and decisive. Within a week, Congress passed a near unanimous resolution authorizing 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." 115 Stat. 244. It further stated that those forces "continue to pose an unusual and extraordinary threat to the national security" and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."

The Appellant, Burhan Addin Ahmed, is a citizen of Pakistan who lawfully entered the United States with his family three days before the 9/11 hijackings on September 8, 2001, purportedly to pursue higher education at Wilson University in Wilson, East Dakota. Four months later, on January 3, 2002, federal agents arrested Ahmed in Wilson, East Dakota as a material witness in the government's investigation of the 9/11 attacks. He was also detained in Wilson.

In November 2002, Ahmed was charged with the possession of counterfeit Social Security cards with the intent to defraud in the Eastern District of East Dakota, and in January 2003, he was

further charged with making false statements to the FBI. He pled not guilty to all charges. The district court set a trial date of July 17, 2003. On June 13, 2003, two days before a scheduled hearing on all pre-trial motions, the government filed an ex parte motion to dismiss the indictment based on an order signed that morning by the President.

The President's order stated that he had "DETERMINED for the United States of America 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." Because Ahmed's detention was "necessary to prevent him from aiding al Qaeda," the President ordered the Attorney General to surrender him to the Secretary of Defense, who was ordered to "detain him as an enemy combatant."

The District of East Dakota dismissed criminal charges against Ahmed and he was transferred to military custody, where he remains. Ahmed filed a writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241 after his transfer to military detention in order to secure his release. In opposition, the government claimed 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. The government also asserted that the process Ahmed was given to challenge his detention was adequate.

The district court determined that Ahmed could be detained as an enemy combatant based on the evidence presented by the government in the form of a hearsay document, the Declaration of

John R. Murphy ("Murphy Declaration"), the Director of the Joint Task For Combating Terrorism. Murphy's Declaration, which avers to have reviewed of all the intelligence gathered by the government, asserts that Ahmed:

(1) trained in an al Qaeda-run terrorist training camp in Afghanistan for 18 months between 1996 and 1998; (2) cultivated relationships with senior al Qaeda leaders, including Osama Bin Laden and Khalid Sheik Muhammed, the masterminds of the 9/11 attacks; (3) was commissioned by al Qaeda to enter the United States as a sleeper agent for the purpose of doing whatever was asked of him, including acting as an al Qaeda martyr; (4) received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator of 9/11; (5) acted as a contact point for al Qaeda operatives newly arriving in the United States; (6) received specific instructions on how to carry out cyber attacks against the Social Security system of the United States for the purpose of creating chaos in the United State's social safety net and securing revenue for future terrorist attacks through Social Security fraud; (7) was in possession of a laptop computer containing research he was conducting regarding use of chemical weapons as weapons of mass destruction, as well as programs and websites devoted to computer hacking, and files containing jihadist propaganda; (8) engaged in telephone communications with high ranking al Qaeda officers; and (9) possessed fraudulently obtained lists of social security numbers and other evidence evidencing his efforts to sell those numbers. It concludes that, upon entering the United States, Ahmed engaged in conduct in preparation for acts of international terrorism intended to cause injury to the United States, and he thus constitutes a continuing grave threat that must be detained in order to prevent him from aiding al Qaeda in its efforts to attack and harm the United States.

The district court also found that Ahmed was entitled to challenge the factual basis of his detention, and the court instructed a magistrate judge to determine the process Ahmed must be afforded. The magistrate judge rejected Ahmed's argument that he had a right to procedural safeguards substantially equivalent to those of ordinary criminal defendants. Instead, he determined that

"the government must provide notice of the factual basis of Ahmed's detention, and that if the government could produce credible evidence supporting his designation as an enemy combatant, the burden would shift to Ahmed to refute this designation with more persuasive evidence. If Ahmed could produce such evidence, the government must either release him or agree to a full adversarial hearing with more robust procedural safeguards."

The magistrate judge determined that the Murphy Declaration provided Ahmed with adequate notice of the factual basis of his detention and offered enough credible evidence to support his designation as an enemy combatant. The magistrate judge granted Ahmed a full 60 days to produce more persuasive evidence to refute this determination.

Ahmed only responded with a general denial repudiating his status as an enemy combatant and steadfastly refused to offer any evidence to rebut the Murphy Declaration on the grounds that the procedures adopted by the magistrate judge were unconstitutional. Because Ahmed failed to present more persuasive evidence to refute the government's determination, the magistrate judge recommended that his petition for a writ of habeas corpus be dismissed. The district court subsequently dismissed Ahmed's petition.

Ahmed appealed the district court's decision dismissing his habeas petition to the United State Court of Appeals for the Twelfth Circuit. A panel of that court affirmed the dismissal. Upon Ahmed's motion for rehearing, the court voted to vacate the panel opinion and hear the case en banc. The court of appeals determined that the Authorization to Use Military Force empowered the President to detain Ahmed as an enemy combatant, but that Ahmed was not afforded sufficient process to challenge his

designation as an enemy combatant. Accordingly, it reversed the district court opinion and remanded for further proceedings.

Both Ahmed and the United States filed petitions for writs of certiorari, which were granted by this Court on October 2, 2009.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly concluded that the AUMF provides the President with statutory authorization to subject Ahmed, an enemy combatant, to military detention. This authority was recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), where the Supreme Court concluded that the AUMF's authorization of the use of all "necessary and appropriate force" against individuals who fought with the Taliban and al Qaeda in Afghanistan included military detention. *Id.* at 518. Subsequently, the Fourth Circuit concluded that this detention authority extends to individuals who fought with al Qaeda in Afghanistan, and then traveled to the United States in order to effectuate the "continued prosecution of al Qaeda's war of terror against the United States." *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

This authority was further expanded to include members of al Qaeda who received training, instruction, and financing from al Qaeda leaders in Afghanistan, and then traveled to the United States in order to plan and eventually initiate attacks against the American homeland. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). Based on the purpose and plain meaning of the AUMF, the court concluded that it would be incompatible for the statute to authorize the detention of enemy combatants who fought

in Afghanistan, yet deny that authority to members of al Qaeda similarly situated to the 9/11 hijackers simply because they did not fight U.S. forces abroad.

Because Ahmed is a member of al Qaeda who came to the United States to launch terrorist attacks against the United States, he Ahmed is a person "squarely within the purposes of the AUMF, which was passed to target organizations, like al Qaeda, responsible for the September 11 attacks and to prevent future terrorist attacks." (*Id.* at 286) (Wilkinson, J., concurring) (emphasis in original). Recent decisions in the D.C. Circuit have reinforced the AUMF's authorization of military detention for individuals who are "part of" al Qaeda. See, e.g., *Hamliily v. Obama*, 616 F.Supp.2d 678 (D.D.C. 2009). This conclusion is consistent with our legal traditions, Supreme Court precedents, and international humanitarian law.

The court of appeals erred in remanding the case to the district court because the court followed this Court's command in *Hamdi* 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." 542 U.S. at 532. The Government would have to produce credible evidence and then the detainee would have to counter with "more persuasive evidence." *Id.* at 534. The district court was a neutral decisionmaker and gave the detainee more than a meaningful opportunity to rebut the government's case because he provided the detainee 60 days to respond with more

persuasive evidence. Nowhere in the Hamdi decision did the Court attach any significance to whether the detainee was detained domestically or internationally nor is the detainee any less dangerous because he was detained domestically. Furthermore, this detainee did not avail himself of the procedures available to prevent any increase of the risk of an erroneous deprivation due to the fact that he was captured within the United States. The Government does not have to produce the most reliable evidence because that burden would infringe upon the ability of the Executive to fulfill his constitutional role. This standard would make these proceedings similar to standard criminal trials, thus defeating the purpose of the burden-shifting scheme and interfering with the ability of the Government to protect its citizens.

Finally, the detainee had a fair opportunity to rebut the Government's evidence but only replied with a general denial. The *Hamdi* Court recognized that the Constitution is not offended if there is a presumption in favor of the Government so the district court dismissed the petition for the writ of habeas corpus when the detainee failed to produce more credible evidence.

ARGUMENT

I. THE COURT OF APPEALS ACCURATELY CONCLUDED THAT THE AUMF AUTHORIZES THE PRESIDENT TO SUBJECT AHMED TO MILITARY DETENTION

The Supreme Court has established that the AUMF has provided the President with specific legislative authorization to capture and detain "organizations" or "persons" whom "he determines

planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," which by definition include members of the al Qaeda terrorist organization. 115 Stat. 224. Ahmed falls squarely within this statutory authorization. His circumstances are substantially similar to those of the attackers who launched the 9/11 attacks. Arguing that the AUMF does not authorize his detention would be akin to arguing that it was not meant to stop another 9/11. The text and history of this act do not support such an illogical approach. Congress clearly intended to authorize the military detention of members of al Qaeda like Ahmed that come to the United States in order to commit hostile or war-like acts. A contrary result would weaken our military's ability to protect our homeland and stop future terrorist attacks.

A. The AUMF authorizes the military detention of enemy combatants

Hamdi v. Rumsfeld, 542 U.S. 507 (2004), acknowledged the President's authority to detain enemy combatants under the AUMF. There, the plurality held that an American citizen 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 the [9/11] attacks" was an unlawful combatant that "Congress sought to target in passing the AUMF." *Id.* at 518. This Court cited *Ex Parte Quirin*, 317 U.S. 1 (1942), to show "that the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Id.* Therefore, although "the AUMF does not use specific language of detention[,] [b]ecause detention to

prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." *Id.* at 519. Moreover, because the President exercises this authority under the specific statutory authorization of Congress, his Constitutional power is at its zenith. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 625 (1952) (Jackson, J., concurring) (noting Presidential power is "at its maximum" when the President operates with Congressional authorization.)

B. US Law and the Law of War authorizes the detention of enemy combatants like Ahmed who travel to the United States for the purpose of attacks on the homeland

Since *Hamdi*, other courts have expanded upon the scope of the AUMF to grant detention authority to the executive to detain members of al Qaeda who travel to the United States with belligerent purposes. First, in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), the Fourth Circuit held that the AUMF authorized the military detention of Jose Padilla, a U.S. citizen "closely associated with al Qaeda, an entity with which the United States is at war," *Id.* at 389, even after he landed on U.S. soil. The court analogized Padilla to Haupt, the enemy combatant in *Quirin*, a United States citizen who entered this country with orders from the Nazis to blow up domestic war facilities but was captured before he could execute those orders. *Id.* at 392. "Like Haupt, Padilla associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on

committing hostile acts on American soil." *Id.* Haupt "received training at a sabotage school near Berlin, where [he] was instructed in the use of explosive and in methods of secret writing," and then landed in the United States and "proceeded in civilian dress" to launch attacks on American cities, *Quirin*, 317 U.S. at 21. Similarly, Padilla "received explosives training at an al Qaeda-affiliated camp," acted as a guard at Taliban outposts, later "met with Khalid Sheikh Mohammad, a senior al Qaeda operations planner who directed Padilla to travel to the United States for the purpose of blowing up apartment buildings," and finally entered this country in civilian dress in order to effectuate that "continued prosecution of al Qaeda's war of terror against the United States." *Padilla* at 390. In light of the AUMF, Padilla's association with al Qaeda in Afghanistan, like Haupt's association with the Nazis in Germany, was sufficiently strong to authorize the executive to detain him as an enemy combatant regardless of the fact that he was arrested on American soil.

Like Haupt and Padilla, Ahmed is a member of an enemy organization that our country has declared war against through the AUMF, who came to the United States in the guise of civilian dress, in order to engage in belligerent, war-like acts against this nation. He is therefore subject to military detention. Judge Gray's concurrence incorrectly concludes that Ahmed is not part of a hostile force that is engaged in armed conflict with the United States based on the fact that there is no evidence suggesting Ahmed ever took up arm on a conventional battlefield

against the United States in Afghanistan. *Ahmed v. United States*, Docket No. 06-9701 (12th Cir. 2008). He reads *Hamdi* to suggest that military detention may only be authorized against individuals who fought for the enemy "in a military theater of operations." *Id.* at 33. This analysis is inconsistent with *Quirin*. In that case, there was no suggestion that Haupt had actually taken up arms against American forces in Europe, yet because "[c]itizens who 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 within the meaning of . . . the law of war," he could rightfully be subject to military detention. *Quirin*, 371 U.S. at 37-38. Similarly, though Ahmed may not have taken up arms against American forces on a foreign battlefield, he nevertheless "associated" with the "military arm" of al Qaeda, and received "aid, guidance and direction" from its top leadership to "enter this country" and commit "hostile acts" against it. See Murphy Declaration. This association with an organization with which our country is at war makes him an enemy combatant subject to military detention.

The dissent's reasoning reflects an outdated understanding of the law of war that fails to account for the modern threat of international terrorism. Al Qaeda is not a mere criminal organization, but is more analogous to an enemy government. Al Qaeda's "soldiers" have transformed the front lines of the war on terror from traditional battlefields to our airport security gates, critical infrastructure sites, and computer firewalls.

Members of al Qaeda like Mohammad Atta, the leader of the 9/11 attacks, did not fight on conventional battlefields before they launched their deadly attacks on our country, yet it is clear that Congress intended the AUMF to authorize the use of force against individuals like him. The realities of this new threat make it appropriate for this Court to analogize al Qaeda to an enemy government, and its associates to members of its armed forces, when they, like Ahmed, are so intimately connected with the infrastructure of the organization.

The Fourth Circuit's majority decision in *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir.2008), vacated *sub nom. al-Marri v. Spagone*, 129 S.Ct. 1545 (2009) reflects this understanding of the modern terrorist threat. The facts of that case were nearly identical to those presented here. Al-Marri, a Qatari citizen legally residing in the United States on a student visa, entered the country shortly before 9/11. Soon thereafter, he was detained as a material witness, was later charged with various offenses related to credit card fraud, and was eventually placed in military detention by the President's order. *Id.* at 219. Later, in response to a habeas corpus petition that al-Marri's counsel filed on his behalf, the government submitted a hearsay declaration asserting that al-Marri was sent by al-Qaeda "to serve as a 'sleeper agent' to facilitate terrorist activities and explore disrupting this country's financial system through computer hacking." *Id.*

Al-Marri's case was referred to a magistrate judge to determine what process was he must be afforded to challenge his

designation. *Id.* at 221. "The magistrate judge ruled that the Rapp Declaration provided al-Marri with sufficient notice of the basis of his detention as an enemy combatant and directed al-Marri to file rebuttal evidence." *Id.* Like Ahmed, al-Marri failed to file any evidence, arguing instead "that the government had an initial burden to produce evidence that he was an enemy combatant and that the Rapp Declaration did not suffice," and subsequently the magistrate judge recommended dismissal of al-Marri's habeas corpus petition. *Id.* The district court adopted that recommendation and dismissed al-Marri's petition.

On appeal *en banc*, a majority of the Fourth Circuit reversed the district court opinion and remanded. On the issue of whether the AUMF authorized the President to declare al-Marri an enemy combatant, a majority of the court concluded "that, if the [g]overnment's allegations about al-Marri [were] true, Congress ha[d] empowered the President to detain him as an enemy combatant." *Id.* at 216. Judge Traxler concluded

"there is no doubt that individuals who are dispatched here by al Qaeda, the organization known to have carried out the 9/11 attacks upon our country, as sleeper agents and terrorist operatives charged with the task of committing additional attacks upon our homeland 'are [also] individuals Congress sought to target in passing the AUMF,"

Id. at 259 (citing *Hamdi* at 518). This is evidenced by the plain language of the statute, which authorizes the President to use "all necessary and appropriate force" against the nations and organizations that "planned, authorized, committed, or aided" the 9/11 attacks, "or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States" and protect United States citizens

"both at home and abroad." 115 Stat. 224 (emphasis added). Both Judge Traxler and Judge Watts in the majority opinion in Ahmed understood that Congress intended for the AUMF to authorize the President to use military force, including detention, to stop the kinds of attacks perpetrated on 9/11 - attacks carried out by individuals similarly situated to al-Marri and Ahmed who, like the 9/11 hijackers, did not engage in combat operations against our forces on a foreign battlefield. The AUMF contains no language to suggest that it was Congress' intent to

"limit the military response or the presidential authorization to acts occurring in foreign territories, and it strains reason to believe that Congress, in enacting the AUMF in the wake of those attacks, did not intend for it to encompass al Qaeda operatives standing in the exact position as the attackers who brought about its enactment." *Id.* at 260.

Like al-Marri, Ahmed is a person "squarely within the purposes of the AUMF, which was passed to target organizations, like al Qaeda, responsible for the September 11 attacks and to prevent future terrorist attacks." (*Id.* at 286) (Wilkinson, J., concurring) (emphasis in original). Ahmed's membership in al Qaeda, the organization against which Congress authorized the use of military force, and knowing engagement "in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization," makes him an enemy combatant subject to military detention. *Id.* at 325. (Wilkinson, J., concurring in part and dissenting in part).

C. The AUMF applies to members of Al Qaeda even if they did not engage in conventional warfare in Afghanistan

Al Qaeda's status as an international terrorists organization, rather than as a "nation state" or "enemy

government," does not mean that the AUMF cannot apply to its members. Al Qaeda is a sophisticated enemy force that is highly integrated with the Taliban in Afghanistan. While it may be an unconventional force, it is one that has declared war on our nation by staging terrible terrorist attacks, and continues to seek to do us harm. See *Hamdi*, 296 F.3d at 283 (4th Cir. 2002) (noting that "the unconventional aspects of the present struggle do not make its stakes any less grave"); *Padilla*, 423 F.3d at 389 (noting that al Qaeda "is an entity with which the United States is at war.") In numerous ways, al Qaeda shares the characteristics of an enemy state. It has fought our soldiers on conventional battlefields, and like the Nazi government in *Quirin*, has sent its members to our shores disguised as civilians in order to perpetuate acts of war, including sabotage and attacks on our military and civilian populations. It would defy the will of Congress and endanger the security of the United States to suggest that because members of al Qaeda do not belong to a traditional nation state, they cannot be subject to military detention.

A series of recent cases involving detainees at Guantanamo Bay reinforce this interpretation of the AUMF. See *Gherebi v. Obama*, 600 F.Supp.2d 43, 71 (D.D.C. 2009) ("President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners"); *Hamlily v. Obama*, 616 F.Supp.2d 63, 78 (D.D.C. 2009) ("Under the AUMF . . . [t]he President also has the authority to

detain persons who are or were part of Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."); *Mattan v. Obama*, 618 F.Supp.2d 24, 26 (D.D.C. 2009) ("[The government's] claimed authority to detain individuals who are 'part of' Taliban, al Qaeda, or associated enemy forces comports with the AUMF's broad authorization of executive force and the laws of war."); *Al Mutairi v. United States*, 644 F.Supp.2d 78 (D.D.C. 2009) ("the President has the authority to detain individuals who are 'part of' the Taliban, al Qaida, or associated enemy forces."). The consensus view of all these precedents is that the AUMF plainly authorizes the President to use "all necessary and appropriate force", including detention, against members of al Qaeda who are "co-belligerents" under the laws of war. *Hamlily*, 616 F.Supp.2d at 15. As a member of al Qaeda who planned belligerent acts against this nation, the AUMF grants authorization to detain Ahmed on the basis of these precedents.

D. The President's authority to detain under the AUMF is not restricted by precedent, statute, or international law

This Court's holding in *Ex Parte Milligan*, 71 U.S. 2 (1866) does not restrict the President's authority to detain Ahmed. The defendant in *Milligan* was a member of a secret organization dedicated to assisting the Confederacy in the Civil War. This Court held that he should be tried in civilian courts rather than military tribunals, because he was a civilian, not a member of the armed forces with which the United States was at war. *Id.* at 118. Members of al Qaeda are fundamentally different from the defendants in *Milligan*, because they are part of an organization

that Congress has expressly authorized the use of force against. See AUMF, 115 Stat. 224. As the Supreme Court subsequently explained in *Quirin, Milligan* stands for the proposition that a person may not be subjected to military detention if the person is "not . . . a part of or associated with the armed forces of the enemy." *Quirin*, 317 U.S. at 45. Because Ahmed *is* a part of the armed forces of an enemy, *Milligan* does not counsel a different conclusion here.

Section 412 of the PATRIOT Act, 115 Stat. 272, does not constrain the President's authority to detain under the AUMF either. It "refers to the President's power, under Article II § 3, to 'take Care that the Laws be faithfully executed.'" *Al-Marri*, 534 F.3d at 288 (citing U.S. Const., art. II, § 3). It constrains the Attorney General's powers in executing the immigration code. By contrast, the authorization granted to the President by the AUMF "relates to the Commander in Chief power . . . [therefore,] whatever limitations are present in the Patriot Act, therefore, do not restrict the separate and distinct grant of power effected by the AUMF." *Id.*

Finally, the detention of members of al Qaeda as enemy combatants is consistent with the law of war. The law of war begins from the premise that states have freedom "to exercise military force in whatever manner they deem appropriate," including the detention of enemy combatants in any conflict, subject to the specific constraints imposed by international humanitarian law. *Gherebi*, 609 F.Supp.2d at 61. The war with al Qaeda is a non-international armed conflict to which Common

Article 3 of the Geneva Conventions applies. *Hamdan v. Rumsfeld*, 548 U.S. 507, 628-29 (2007). Far from restricting the ability to detain enemy combatants in non-international armed conflicts, Common Article 3 presupposes that some combatants will be placed "'hors de combat' by . . . detention," and only mandates that they be treated in accordance with certain fundamental human rights. Third Geneva Convention, art. 3. Thus, Ahmed's military detention is not inconsistent with the law of war.

II. THE DETAINEE WAS AFFORDED DUE PROCESS TO CHALLENGE HIS DETENTION BECAUSE HE [1] WAS BEFORE A NEUTRAL DECISIONMAKER THAT II. PROVIDED HIS CASE WITH THE SPECIAL ATTENTION OF A MAGISTRATE JUDGE, [2] RECEIVED MORE FACTUAL NOTICE FOR THE BASIS OF HIS DETERMINATION THAN THE DETAINEE IN *HAMDI V. RUMSFELD*, 542 U.S. 507 (2004), AND [3] HAD A GENEROUS OPPORTUNITY TO REBUT THE GOVERNMENT'S COMPELLING EVIDENCE AGAINST HIM BUT FAILED TO GENERATE ANY CONSEQUENTIAL OPPOSITION, HE SHOULD NOT BE REWARDED WITH UNNECESSARY PROCEDURES THAT WILL NOT REDUCE THE LIKELIHOOD OF AN ERRONEOUS DEPRIVATION IN HIS CASE.

In the present case, the district court was presented with the Murphy Declaration, a detailed affidavit from the Director of the Joint Intelligence Task Force for Combating Terrorism, that describes the detainee as someone who "attended an al Qaeda run terrorist training camp," is "trained in the use of poisons," who "has computer files containing lectures by Osama Bin Laden," and "has cultivated relationships with . . . him" as well as "received substantial funding from . . . the financial facilitator of 9/11." Record ("R.") at 47-48.

In *Hamdi v. Rumsfeld*, the Court held 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.”¹ 542 U.S. at 533 (2004). The Court then created a flexible “burden-shifting scheme” that placed “the onus [on] the petitioner to rebut th[e] Government’s] evidence with more persuasive evidence” “once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria” *Id.* at 534. The Court explicitly modeled its due process approach for a citizen that is detained by the Executive after “the test that [it] articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976).” *Hamdi*, 542 U.S. at 529. Because of “their uncommon potential to burden the Executive at a time of ongoing military conflict” enemy-combatant proceedings may accept “[h]earsay, for example . . . as the most reliable available evidence from the Government in such a proceeding.” *Id.* at 533–34. The Court understood that this process “would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error” while meeting *Mathews*’s goal of “eliminating

¹ Judge Wilkinson of the Fourth Circuit recognized that

“[*Boumediene v. Bush*, 128 S. Ct. 2229 (2008)]the Court in *Boumediene* explicitly distinguished the question of what procedures are required under the Suspension Clause from the question of what procedures are required under the Due Process Clause. See *Boumediene*, 128 S. Ct. 2269–70. In doing so, the Court explicitly stated that it made ‘no judgment’ as to the issue addressed in *Hamdi* and presented by al-Marri’s case: what process is constitutionally due to a detainee when ‘[t]he § 2241 habeas corpus process remained in place.’ See *Boumediene*, 128 S. Ct. at 2269.”

al-Marri v. Pucciarelli, 534 F.3d 213, 358 (4th Cir. 2008) (Wilkinson, J., concurring in part dissenting in part), *vacated sub nom.* al-Marri v. Spagone, 129 S.Ct. 1545 (2009).

certain procedures that have questionable additional value in light of the burden on the Government.” *Id.*

It is under this framework a district court that was presented “with more detailed and thorough” evidence than the district court in *Hamdi* “provided the same procedural safeguards [to Ahmed]” “approved [in that case]” *Id.* at 42; 45 (Morrison, C.J., concurring in part dissenting in part). Because this is in accord with the *Mathews* test as presented in *Hamdi* this Court should reverse the decision below and uphold the ruling of the district court.

A. The detainee received a neutral decisionmaker.

The district judge “proceed[ed] with the caution” and sent this case to a magistrate judge who can normally provide better individual attention, to decide what process must the detainee can be afforded to challenge his status. *Hamdi*, 542 U.S. at 539. The magistrate judge was “both prudent and incremental” because he determined that the government must “produce credible evidence” and once the government produced the meticulous Murphy Declaration he gave the detainee 60 days to provide rebuttal evidence. *Id.* The detainee made no discovery requests and made poor use of his time as he only provided a general denial that not supported with any evidence. In light of this, the magistrate recommended that the detainee’s habeas petition be dismissed because “the Constitution [is not] offended by a presumption in favor of the Government” in these proceedings. *Id.* at 534; *See also Mathews*, 424 U.S. at 349 (“substantial weight must be given to the good-faith judgments of the

[Government].” The detainee rejected “being forced to prove his own innocence” but he should not receive the benefit of “additional protections [when] he has never [even] used the protections available to him” this will “impose[] procedural burdens without any indication that these burdens will produce a corresponding reduction in the likelihood of erroneous deprivation.” *al-Marri*, 534 F.3d at 374 (Wilkinson, J., concurring in part dissenting in part), *vacated sub nom. al-Marri v. Spagone*, 129 S.Ct. 1545 (2009).² Finally, “if a general denial were deemed sufficient to bring the accuracy of the Declaration into question, then the whole *Hamdi* burden-shifting framework would be rendered *useless*.” *Id.* at 360-361.

The district court ultimately agreed with the recommendation of the magistrate judge and dismissed the habeas petition and achieved the proper balance between “matters of national security . . . and to the constitutional limitations safeguarding essential liberties.” *Id.*

B. The detainee received adequate factual notice for the basis of his determination.

“The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.” *Mathews*, 424 U.S. at 328 (internal citations and marks omitted), *accord Hamdi*, 542 U.S. at 529. The government in the present case provided a much stronger, detailed, and more concrete statement of why it believed “Ahmed must be detained to prevent him from aiding al

² The facts of *al-Marri* are provided

Qaeda in its efforts to attack and harm the United States" than it did for the detained in *Hamdi*. R. at 7;48. Compare *Hamdi*, 542 U.S. at 513 ("Hamdi was labeled an enemy combatant '[b]ased upon his interviews and in light of his association with the Taliban.'"") with R. at 47-48 (Ahmed "received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator of 9/11", his laptop "revealed computer files containing Arabic lectures by Osama bin Laden," his laptop case had a "handwritten list of social security numbers . . . issued to persons other than Ahmed").

The Twelfth Circuit plurality believed that "[t]he practical burden on the government in producing the evidence against Ahmed is lessened" because he was captured in the United States and "the relevant against him is not likely 'buried under the rubble of war.'" R. at 27 (internal citations omitted). However, because "[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation," the *Hamdi* plurality instructs courts to "accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (internal citations omitted); *Hamdi*, 542 U.S. at 535. Furthermore, this "the battlefield/non-battlefield distinction is not to be found in *Hamdi*" and in *Ex Parte Quirin* the Court acknowledged that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency." 317

U.S. 1, 37-38 (1942); *al-Marri*, 534 F.3d at 362 (Wilkinson, J., concurring in part dissenting in part).

It is irrefutable that the detainee received adequate factual notice for why he was being detained as an enemy-combatant but unilaterally decided not to present any evidence to the contrary.

C. The detainee had a fair and generous opportunity to rebut the government's compelling evidence against him but he failed to generate any consequential opposition so he should not be rewarded with unnecessary procedures that will not reduce the likelihood of an erroneous deprivation in his case.

As described above, the Government produced stronger evidence against the detainee in the case at bar than it did in *Hamdi*, however the district court still afforded the detainee the same level of process. This is to ensure that if he was "the errant tourist, embedded journalist, or local aid worker" that he would have ample opportunity "to prove military error." *Hamdi*, 542 U.S. at 534.

The plurality decision below erroneously directs the district court to determine whether the Murphy Declaration is "the most reliable evidence." R. at 27. This is incorrect for three reasons. First, that decision takes *Hamdi* out of context because

"[it] relies on the following observation made in *Hamdi*: '[E]nemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.' *Hamdi*, 542 U.S. at 533-34; see ante at 81, 88 (quoting *Hamdi*). Rather than take this

comment for what it clearly is -- an example of how the procedures afforded enemy combatants need to account for the evidentiary burdens that are frequently present in such cases -- the concurrence develops a hardline requirement that the government must always show, in its initial presentation, that the evidence offered is the most reliable evidence available." *al-Marri*, 534 F.3d at 334 (Wilkinson, J., concurring in part dissenting in part)

Second, the detainee here unlike Hamdi, demonstrated a total refusal to participate in his own defense.³ *Compare Hamdi* ("Hamdi's father has asserted in documents found elsewhere in the record that his son went to Afghanistan to do 'relief work'") with *R.* at 9 (Ahmed "refused to offer any evidence to rebut the Murphy declaration"); see also *al-Marri*, 534 F.3d at 292 (Williams, C.J., concurring in part dissenting in part) ("It is simply beyond the pale for *al-Marri* to contend that he was unable, without further discovery from the Government, to put forth evidence that he did or did not attend class.").

Awarding the detainee more procedures can lead to a spectacle of a trial that can potentially threaten security. "Al Qaeda has already carried out a mass killing abroad and left a written message stating that the killing was in retaliation for the actions of a federal trial judge." *al-Marri*, 534 F.3d at 308

³ This past term in a post-conviction case the Court held that there was no constitutional right to a DNA test despite the test's "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *Dist. Attorney's Off. for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2312. The concurrence actually found that the petitioner's claim failed also because the defendant in that case "decline[d] the opportunity to perform DNA testing at trial." *Id.* at 2324 (Alito, J., concurring). The detainee in this case made a much worse showing in court since he did not provide any evidence to even rebut the claim that he cultivated a relationship with Osama bin Laden, a man whom the FBI, CIA, or the Armed Forces are able to locate. *Osborne*, 129 S. Ct. 2308 ("It is difficult to criticize the State's procedures when *Osborne* has not invoked them.").

(Wilkinson, C.J., concurring in part dissenting in part) (internal marks and citations omitted). The detainee can also make endless and aimless requests to prolong the trial. The trial can also be a recruiting tool to attract new terrorist possibly within our borders.

Finally, the evidence against the detainee is quite compelling and despite having roughly two months to *at least* produce some evidence to rebut *at least* one charge in the mound of charges against him he did nothing. He should not be rewarded with more procedures for his intransigence. *Osborne*, 129 S. Ct. at 2319 ("Process is not an end in itself.").

CONCLUSION

In conclusion, the Supreme Court's ruling in *Hamdi* and subsequent authoritative constructions of the AUMF compel the conclusion that the President has the authority to detain Ahmed as an enemy combatant. This conclusion is consistent with domestic and international law, and represents a straightforward application of the plain terms of the AUMF and the reasoning of the plurality's decision in *Hamdi*. As the district court found, and the circuit court affirmed, the President is authorized to detain aliens as enemy combatants when they, like Ahmed, train with al Qaeda and then enter the United States to commit acts of international terrorism.

The Government's Murphy Declaration provided strong evidence against the detainee and the detainee was given 60 days to counter the government's evidence and he presented no evidence and simply made a general denial. In essence, he is seeking more

process when he has not taken advantage of the meaningful opportunity presented to him below. The district court afforded him the same process as the detainee in *Hamdi*. The fact that he was in the country when he was captured is of little value because nowhere in *Hamdi* is there a distinction between a detainee that works for al-Qaeda in Afghanistan or for one that works for al-Qaeda in East Dakota.

Finally, we request that this Court affirm the decision below with respect to the Executive's authority to detain Ahmed and we ask this Court to reverse the decision below with respect to whether the petitioner was afforded due process to challenge his detention.