

In the  
Supreme Court of the United States

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**Burhan Uddin Ahmed,**  
*Petitioner,*

v.

**The United States of America.**  
*Respondent.*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for  
the Twelfth Circuit

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**BRIEF FOR THE RESPONDENT**  
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Team Number: 2936

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Authorization for Use of Military Force 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.

## **STATEMENT OF JURISDICTION**

The judgment of the Court of Appeals was entered on November 24, 2008. The petitions for writs of certiorari were granted on October 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## **I. STATEMENT OF THE CASE**

### **a. Statement Of Facts**

On September 8th, 2001, Petitioner Burhan Uddin Ahmed lawfully entered the United States, ostensibly to pursue a degree at Wilson University in Wilson, East Dakota. (Record at 7.) Three days later, on September 11th, 2001, functionaries of the al Qaeda terrorist organization hijacked three commercial airliners leaving from airports in the United States. They flew them into heavily populated and symbolic targets in New York City and Washington, D.C., killing approximately 3,000 people. (R. at 6.) In response, Congress passed a joint 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." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (AUMF).

On January 3rd, 2002, Petitioner was sought as a material witness in the government's ongoing investigation of the events of September 11th. Federal agents arrested Petitioner and detained him in Wilson. (R. at 7.)

In November 2003, Petitioner was charged in the District of East Dakota with possession of counterfeit Social Security cards with the intent to defraud, and in January 2003, Petitioner was additionally charged with making a false statement to the FBI.

On June 13th, 2003, prior to a set pretrial hearing, the government filed an ex parte motion to dismiss the indictment following an order signed by the President. (R. at 7.)

The order stated that the President had determined that Petitioner is an enemy combatant associated with al Qaeda, was "engaged in conduct that constituted hostile and war-like acts" in preparation for acts of terrorism, "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda," and "represents a continuing, present, and grave danger to the national security of the United States." (R. at 7.) For these reasons, and because the President determined that Petitioner's detention was "necessary to prevent him from aiding al Qaeda," the President ordered the Attorney General to surrender Petitioner to the Secretary of Defense, who was then ordered to detain Petitioner as an enemy combatant. The government's motion to dismiss was granted. (R. at 7.) Petitioner remains in military custody at the Army Regional Consolidated Detention Facility in Souda, East Dakota. (R. at 8.)

**b. Procedural Posture**

Petitioner filed a petition for a writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241, claiming his detention was unlawful and that the government was required to file criminal charges against him or release him. Petitioner

alternatively claimed that he was entitled to a hearing to challenge the factual basis for his detention. (R. at 8.)

The government opposed Petitioner's release and provided the court with the Declaration of John R. Murphy. (App. A.) This document details the actionable intelligence upon which Petitioner was detained, including his relationships with high level al Qaeda leaders and the means by which he sought to engage in terrorist activities. (App. A.) The district court agreed that Petitioner could be detained as an enemy combatant on this basis, but held he was entitled to challenge the factual basis of his detention. The court sent the case to a magistrate judge to determine the process Petitioner was due. (R. at 9.)

The magistrate judge determined that Petitioner was entitled to notice of the factual basis for his detention. It further determined that the government was to produce credible evidence supporting Petitioner's designation, and that the burden to refute this designation belonged to Petitioner. If he could produce this evidence, the government was to release him or engage in a full adversarial hearing. (R. at 9.)

Turning to the Murphy Declaration, the magistrate judge determined that it served to provide Petitioner with notice of the factual basis for his detention and was sufficient to indicate that Petitioner was an enemy combatant. Petitioner was given 60 days to rebut the claims. (R. at 9.)

Rather than engage in the procedure outlined by the magistrate judge, Petitioner responded with a general denial and refused to participate further. Unable to continue, the magistrate judge recommended that the petition be dismissed. The district court agreed and complied. (R. at 10.)

Petitioner appealed to the Twelfth Circuit, and a panel of the court affirmed the district court's dismissal. Petitioner moved for a rehearing, and the Twelfth Circuit agreed to hear the case en banc. (R. at 10.)

The en banc panel held that the President was authorized to detain Petitioner pursuant to his authority under the AUMF, but that he was entitled to more process than he was afforded. (R. at 28.) The court remanded the case to the district court to determine whether the Murphy Declaration "is the most reliable available evidence." (R. at 28.)

## **II. SUMMARY OF ARGUMENT**

Since September 11th, 2001, when the United States sustained its first attack since Pearl Harbor, the country has been at war. Unlike the attack on Pearl Harbor, however, it was not an enemy nation that was responsible for the September 11th attack. It was instead an entity unknown to warfare in past decades - the international terrorist organization al Qaeda. As an international organization, al Qaeda does not have a recognized government or defined territory. Thus, the war against al Qaeda

must be conducted at locations throughout the world, including here in the United States.

Petitioner is alleged to be an active agent of al Qaeda present in the United States. (App. A.) The President has taken Petitioner into military custody on evidence that he was commissioned by al Qaeda to enter the United States as a sleeper agent. (App. A.) The President has determined that Petitioner's detention is "necessary to prevent him from aiding al Qaeda" in its mission to destroy the United States. (R. at 7.)

Petitioner challenges his detention here. He asks this Court to hold that the President is without legal authority to detain him as an operative of al Qaeda, the entity with which the United States is at war. (R. at 10.) Petitioner further asks this Court to compel the President to afford him process greater and more extensive than that prescribed by the *Hamdi* Court for properly classified enemy combatants. *Id.* These claims must fail.

1. The AUMF empowers the President to detain enemy combatants for the duration of the current military campaign against al Qaeda. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004). The President has determined that Petitioner Ahmed is one such enemy combatant. (R. at 7.) Under *Hamdi*, this determination should not be disturbed unless it is "sufficiently clear" that the factual allegations against Petitioner place him outside the

category of enemy combatant. See *Hamdi*, 542 U.S. at 523. The stated factual basis for the allegation that Petitioner is an active al Qaeda agent is more than enough to qualify him as an enemy combatant subject to military detention. The President's conclusion that it is necessary as a matter of national security to detain Petitioner and prevent him from carrying out an attack on the United States is a proper exercise of the President's authority under the AUMF.

2. Apart from the statutory authority provided by Congress, the President possesses inherent constitutional authority as Commander in Chief of the United States armed forces to detain Petitioner. See U.S. Const. art. II. The Constitution assigns to the President the responsibility of protecting the country from attacks conducted by enemies of the United States.

Military detention of al Qaeda operatives is necessary to the fulfillment of that responsibility. No separate congressional authorization is necessary for the President to fulfill his constitutional duty to provide for the security of the nation against enemy attacks.

3. The process the President has afforded Petitioner satisfies due process. The Court's decision in *Hamdi* prescribes the process constitutionally due detainees properly classified as enemy combatants. See *Hamdi*, 542 U.S. 507. Under *Hamdi*, the district court is required to provide a detainee factual notice

of the basis for his detention and a fair opportunity to rebut the government's contentions. See *id.* at 553. The district court has done that here. (R. at 9.) Petitioner refused to participate in the district court evidentiary hearing because it did not mirror that of a hearing in the criminal system. (R. at 9-10.) This refusal defies the Court's *Hamdi* decision and cannot call into question the propriety of the process itself.

### **III. ARGUMENT**

#### **a. The President Has Legal Authority To Detain Petitioner As An Enemy Combatant**

Petitioner's initial claim is that the President is without legal authority to detain him. This claim is without merit. Congress has authorized the detention of enemy combatants with passage of the AUMF. Petitioner is an enemy combatant. The President thus acts according to the authority provided by the AUMF in detaining Petitioner.

Even in the absence of the AUMF, the President has inherent constitutional authority to detain Petitioner. The Constitution assigns to the President the role of Commander in Chief of the United States armed forces. See U.S. Const. art. II. The President's duty as Commander in Chief is to protect and secure the nation during times of war. Petitioner's detention is a necessary measure to protect nation against the threat of al

Qaeda. The President is acting within his constitutional authority in so doing.

**i. Congress Has Authorized The President To Detain Enemy Combatants With Passage Of The AUMF**

Congress passed the AUMF in direct response to the attacks of September 11th, 2001. See *Hamdi*, 542 U.S. at 510. The AUMF is the equivalent of a formal declaration of war, and the United States is at war as a result of its passage. Declarations of war have historically been directed at particular nation-states, but the circumstances of the current war require a departure from this traditional framework. The AUMF does not target an individual nation-state defined solely by territorial or geographical boundaries. Rather, it defines the enemy by referencing the particular war-like act that triggered its passage. Thus, the current war is not between the United States and another nation-state. It is between the United States and any "nations, organizations, or persons" responsible for the September 11th attacks. See 115 Stat. 224 (2001).

Responsibility for determining which "nations, organizations, or persons" are behind the attacks belongs to the President, both by constitutional design and statutory imperative. See *id.* (authorizing the President to use military force against any entity "he determines planned, authorized, committed, or aided" the September 11th attacks). Once the President determines that

a particular entity falls into one of the categories established by the AUMF, that entity is an enemy with which the United States is at war. As Commander in Chief, it is the duty of the President to wage war against that entity on behalf of the United States. One of the "fundamental incident[s] of waging war" is detention of individuals belonging to the forces of the enemy. See *Hamdi*, 542 U.S. at 519.

The Court explicitly recognized and endorsed this general principle of war in both the *Quirin* and *Hamdi* decisions. See *Ex Parte Quirin*, 317 U.S. 1 (1942); *Hamdi*, 542 U.S. at 519. In *Hamdi*, the Court held that the AUMF authorizes the President to detain individuals he properly classifies as enemy combatants. *Id.* Moreover, at least a plurality of the Court thought the power to detain enemy combatants so "fundamental and accepted an incident to war" as to permit detention of United States citizens belonging to that category, notwithstanding the general prohibition on citizen detention contained in 18 U.S.C. §4001(a) (2000). See *id.* at 517.

*Hamdi* followed the Court's previous decision in *Quirin*, which held that the military detention and trial of a United States citizen who was an unlawful enemy belligerent<sup>1</sup> was consistent with the Constitution and the laws of war. See *Quirin*, 317 U.S.

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<sup>1</sup> The Court treats the terms "belligerent" and "combatant" as synonyms. See *Padilla*, 423 F.3d at 392 (explaining that the *Hamdi* court used "enemy combatant" as equivalent to the term "enemy belligerent" used in *Quirin*).

at 15-16. *Hamdi* built upon *Quirin* and a long line of separate precedents to establish definitively that constitutional due process does not always require the full process afforded to criminal defendants in the United States. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997); *United States v. Salerno*, 481 U.S. 739, 755 (1987); *Addington v. Texas*, 441 U.S. 418, 427-28 (1979); *Humphry v. Smith*, 336 U.S. 695 (1949). Thus, it does not offend due process simply that the executive detains an individual, even a citizen, outside the criminal process.

The principle that due process does not require full criminal protections is especially relevant in the arena of war and foreign affairs, where the courts' competence is at a minimum. See *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948). The fundamental teaching of *Hamdi* is that due process is not a rigid concept, and that *criminal process* is not readily applicable to those detained by President in his role as Commander in Chief. This principle forms the basis of the holding in *Hamdi* that the AUMF authorizes the President to detain an individual he properly classifies as an enemy combatant. See *Hamdi*, 542 U.S. at 523.

**ii. The President Properly Determined That Petitioner Is An Enemy Combatant**

Because Congress has authorized the President to detain enemy combatants, Petitioner must claim that he is not an enemy

combatant to avoid falling within the scope of that congressional authorization. Stated differently, Petitioner's military detention is authorized by the AUMF unless he can show that the President erred in classifying Petitioner as an enemy combatant. The President has not erred here. The President's decisions as Commander in Chief are due the utmost deference. See *Chicago & S. Air Lines, Inc.* 333 U.S. at 109. Even without such deference, however, the President's classification of Petitioner as an enemy combatant is consistent with the Court's precedents on military detention as established in *Quirin, Ex Parte Milligan*, 71 U.S. 2 (1866), and *Hamdi*.

*Hamdi* establishes the framework for judicial review when a detainee challenges his classification as an enemy combatant under the AUMF. See *Hamdi*, 542 U.S. 507. Resolution of the threshold question whether the President has properly classified Petitioner as an enemy combatant is based on the government's allegations against him. See *id.* at 516. For purposes of this threshold determination, those allegations are taken as true.<sup>2</sup> As long as it is "sufficiently clear" from the facts forming the basis of the government's allegations that the President did not err in determining that a detainee is an enemy combatant, courts should not disturb the President's finding. See *id.* at 523.

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<sup>2</sup> Petitioner's opportunity to dispute the factual basis for his detention and classification comes at a subsequent stage, after the court determines that the President has properly classified him as an enemy combatant.

There is ample precedent from this Court establishing the general principle that the President should be accorded substantial deference when performing his duties as Commander in Chief. *See, e.g., Chicago & S. Air Lines, Inc.*, 333 U.S. at 109; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Humphrey*, 336 U.S. 695. The Court's jurisprudence in this area supports the proposition that judicial scrutiny of the President's determination that Petitioner is an enemy combatant should be limited. Particularly where (as here) the President is acting pursuant to the authority granted to him by Congress, so that he is exercising not only his own Commander-in-Chief powers but also "all [the war powers of the federal government] that Congress can delegate," his actions are "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

The President should be given wide latitude in the exercise of constitutional war powers, but whatever deference the Court accords the President's determination in this case, it is more than "sufficiently clear" from the facts forming the basis of the government's allegations that Petitioner fits within the category of enemy combatant. At the very least, the boundaries of that legal category must be broad enough that they encompass the previous situations in which the Court has upheld military

detention by the President. Specifically, the category must be defined to include the detainees in both the *Hamdi* and *Quirin* cases. Defining the category thus, the President did not err in his determination that Petitioner is an enemy combatant.

In *Hamdi*, the Court noted the allegations that detainee was affiliated with and had received military training in Afghanistan from the Taliban, which had harbored al Qaeda, one of the United States' enemies targeted by the AUMF. See *Hamdi*, 542 U.S. at 512-13. The Court also noted the government's statement that "individuals associated with" the al Qaeda and the Taliban "were and continue to be enemy combatants." *Id.* at 513. The Court concluded it was proper for the President to classify Hamdi as an enemy combatant based on the government's allegation that he was "part of or supporting forces hostile to the United States . . . in Afghanistan and [had engaged] in an armed conflict against the United States there." *Id.*

As in *Hamdi*, the citizen-detainee in *Quirin* was affiliated with and had been trained by an enemy of the United States. See *Quirin*, 317 U.S. at 21. Unlike the detainee in *Hamdi*, however, the detainee in *Quirin* had not fought or been captured on a foreign battlefield. Rather, he was captured by the Federal Bureau of Investigation while disguised as a civilian in the United States. *Id.* The detainee had been instructed by the German High Command to enter the United States with the purpose

of using his training to destroy war industries and war facilities. *Id.* He had been supplied with money by the German government, both as a salary and to supply the funds necessary to carry out his hostile mission. *Id.* at 21-22.

The Court considered it irrelevant that the detainee had not directly fought U.S. troops on the battlefield or “entered the theatre or zone of active military operations,” stating that “[i]t is without significance that [the detainee was] not alleged to have borne conventional weapons or that [his] proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States.” *Id.* at 37-38. It was enough that the detainee had “passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose.” *Id.* at 38. The Court held unanimously that it was proper for the President to detain and try the citizen-detainee based on the allegations before it. *See id.* at 15-16.

Collectively, the Court’s precedents in *Hamdi* and *Quirin* establish the basic criteria for the courts to apply when attempting to demarcate the outer boundary of the category enemy combatant. Whatever its scope, it must at a minimum contain the situations covered by those precedents. The factual allegations in the present case are substantively analogous to those in one or both of the *Hamdi* and *Quirin* cases and place Petitioner

comfortably within the category of enemy combatant. They establish that Petitioner is closely associated with al Qaeda, an enemy of the United States. See Murphy Declaration, App. A. He received training from al Qaeda for 18 months in Afghanistan. *Id.* He received monetary support in the form of "substantial funding" from al Qaeda leaders. *Id.* He was commissioned by al Qaeda to enter the United States as a sleeper agent and commit hostile acts against it, but was captured by the FBI before carrying out those acts. *Id.* Petitioner also met with and (while in the United States) made phone calls to the highest ranking of al Qaeda officials. *Id.*

In light of all this, it is unsurprising that the court below concluded that the government's allegations placed Petitioner within the legal category of enemy combatant. (R. at 18.) Each of the allegations against Petitioner finds an analog in either *Hamdi* or *Quirin* (or both). Nonetheless, Petitioner contends that none of the government's allegations place him within the category of enemy combatant. See *id.* at 16, 29. To support this claim, Petitioner cites *Ex Parte Milligan*, a Civil War case in which the Court held that a United States citizen could not be tried by a military tribunal when the country's courts were open and unobstructed. 71 U.S. 2 (1866).

Petitioner's reliance on *Milligan* is misplaced. It ignores the Court's subsequent decisions expressly limiting the holding

in *Milligan* to mean only that U.S. citizens who are *not* enemy combatants must be tried in the criminal system. The Court first put to rest the notion *Milligan* stood for anything more in *Quirin*, where it upheld the military detention and trial of a U.S citizen who was an enemy belligerent. See *Quirin*, 317 U.S. at 19; *Hamdi*, 542 U.S. at 522 (stating that *Quirin* “dismissed the language of *Milligan*” that suggested that citizens in the U.S. could not be tried by military tribunal). The detainee in *Milligan* was not an enemy belligerent, so the Court found *Milligan* inapplicable. See *Quirin*, 317 U.S. at 19.

If any doubt as to the lack of *Milligan*'s vitality remained after *Quirin*, its limited precedential value was established permanently by the plurality in *Hamdi*. See *Hamdi*, 542 U.S. at 523. To the extent there was any inconsistency between *Milligan* and *Quirin*, the Court clarified: “*Quirin* was a unanimous opinion. It both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances [i.e., when the citizen is an enemy combatant].” *Id.* at 523. Thus, it is *Quirin*, not *Milligan*, which informs the inquiry whether the President has the power to detain Petitioner as an enemy combatant. As confirmed in *Hamdi*, *Quirin* established that the President does have that power.

Petitioner argues that he cannot be an enemy combatant under *Quirin* and *Hamdi* because there is no allegation that he is a member of the military arm of an enemy government. (R. at 15.) However, that Petitioner is affiliated with the military arm of an enemy *organization* rather than the military arm of an enemy *government* is of no moment. Such a false distinction contradicts the AUMF, which directs military force against not only enemy governments, but enemy "nations, organizations, or persons." See AUMF, 115 Stat. 224 (emphasis supplied). It is not the place of the courts to substitute their judgment regarding how to define the entities with which the United States is at war for that of the two branches of our government constitutionally entrusted with those determinations.

Finally, Petitioner claims it is significant that, unlike the detainee in *Hamdi*, he is not alleged to have taken up arms against the United States. This creates a false and unnecessary distinction between an enemy who actually takes up arms against the United States and an enemy who enters the United States to commit warlike acts on its soil. As discussed above, the Court in *Quirin* held explicitly that it was irrelevant that the detainee there had not taken up arms against the United States. See *Quirin*, 317 U.S. at 37-38. Petitioner's argument that he cannot be an enemy combatant because he has never fought the United States in an armed battle is impossible to reconcile with

*Quirin*. It is based on the erroneous conclusion that “an ‘engaged in armed conflict against the United States’ element” is necessary under *Hamdi* for a detainee to qualify as an enemy combatant. (R. at 32.) This is a misreading of *Hamdi*. The plurality there did *not* limit the definition of enemy combatant to cover only situations mirroring those in that case. To do so would have meant overruling *Quirin*, which it expressly declined to do. Indeed, the plurality did the opposite of this by *reaffirming Quirin* and leaving to the lower court’s the task of defining the boundaries of the category enemy combatant consistent with its precedents.

**iii. The President Has Inherent Constitutional Authority As Commander In Chief To Detain Petitioner For The Security Of The Nation**

Article II of the Constitution states that the “President shall be Commander in Chief” of the United States armed forces. U.S. Const. art. II. The Executive is the only branch of government headed by a single individual who is elected by the citizens from all of the United States. The Constitution’s grant of broad military powers to a single executive was necessary to capture the benefits of “[d]ecision, activity, secrecy, and dispatch” imperative to effective protection of the national security. The Federalist No. 70 (Alexander Hamilton).

Courts have looked to the tripartite conceptual framework provided by Justice Jackson in his influential and familiar

*Youngstown* concurrence to evaluate challenges to the President's exercise of these broad powers. See *Youngstown*, 343 U.S. 579 (Jackson, J., concurring). Applying that framework here, the President's detention of enemy combatants is pursuant to the will of Congress as expressed in the AUMF and identified in *Hamdi*. See *Hamdi*, 542 U.S. 507. Accordingly, his action is in the first of Justice Jackson's categories and entitled to "the strongest of presumptions" of legitimacy. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

Even if this Court were to hold that Congress has not authorized the President to detain Petitioner, however, the President's actions are legitimate under the second of Justice Jackson's three categories - i.e., where the President acts pursuant to his own independent authority or within the "zone of twilight" in which his and Congress's powers are concurrent. See *id.* Under this category, the President's actions are legitimate unless either the federal government as a whole lacks the power to take those actions or the President is acting in an area over which Congress's power is exclusive. *Id.* Finding the former would be tantamount to a determination that Petitioner's military detention is unconstitutional, a conclusion seriously undermined by the Court's holding in *Quirin*. 319 U.S. 1.

Similarly, the latter conclusion contradicts the basic principle that the President and Congress share the nation's war

powers. There is no statute or provision of the Constitution reserving to Congress the exclusive power to prescribe detention procedures or otherwise micromanage the manner in which war is conducted, and for good reason. Conducting war requires the flexibility, "activity, secrecy, and dispatch" possessed only by the Executive. The Federalist No. 70. Moreover, Congress has enacted the AUMF, which is "closely related to the question of the President's authority" to detain members of al Qaeda and evinces an "intent to accord the President broad discretion." See *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). Even if this did not amount to congressional authorization under Justice Jackson's first category, it may "'invite' 'measures on independent presidential responsibility'" under the second. *Id.*

The United States is at war with al Qaeda. With or without statutory authorization, military detention of enemy combatants is a "fundamental incident of waging war." *Hamdi*, 542 U.S. at 519. The Constitution assigns to the President the duty to ensure that the nation is secure, especially during times of war. Even if the President were without statutory authority to detain Petitioner, that detention is necessary to the fulfillment of the President's constitutional duty. In the absence of any expression of congressional disapproval, the legitimacy of the President's actions is manifest.

**b. The District Court Properly Applied The Hamdi Framework**

The Court of Appeal concluded that the District Court “erred in the process it afforded Ahmed in his habeas proceeding” and remanded the case for further consideration. (R. at 28.) This conclusion is erroneous and contrary to the holding in *Hamdi*. The District Court properly applied the *Hamdi* framework, giving Petitioner notice of the factual basis for his designation as an enemy combatant and a fair opportunity to rebut the government’s contentions. Petitioner’s continued detention is not the result of a faulty process applied by the District Court, but instead is the result of Petitioner’s own refusal to mount an argument against the government’s determination.

**i. The Hamdi Framework**

In *Hamdi*, a plurality of the Court employed the due process balancing test outlined in *Mathews v. Eldridge* to determine the process due an enemy combatant lawfully detained under the President’s authority. 542 U.S. at 529; *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Mathews* Court identified three factors to consider when determining what process is due in a judicial proceeding:

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 v. Eldridge*, 424 U.S. at 335.

In applying this test, the *Hamdi* Court recognized the "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." 542 U.S. at 531. It further recognized the "practical difficulties" of a "trial-like process" in enemy combatant cases, where military officers engaged in battle would be "unnecessarily and dangerously distracted by litigation half a world away." *Id.* at 531-532. Finally, it recognized that "discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war." *Id.* at 532.

The plurality balanced these governmental interests against "a citizen's right to be free from involuntary confinement by his own government without due process of law," and concluded 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." *Id.* at 531, 533.

This baseline requirement is informed by two further considerations discussed in *Hamdi*. First, the plurality stated that the structure of habeas proceedings as outlined by 28 U.S.C. 2241, et seq., provided a "skeletal outline" of the proceedings as they should be designed in enemy combatant cases. *Hamdi*, 542 U.S. at 525. This included an opportunity for petitioners to "present and rebut facts" as well as a degree of flexibility for courts to shape the proceedings. *Id.* at 526.

Second, and related to the first consideration, the plurality recognized that "the exigencies of the circumstances" may demand tailoring to relieve the burden on the Executive "at a time of ongoing military conflict." *Id.* at 533. Specifically, the plurality stated that courts could allow hearsay as "the most reliable available evidence" from the government, and that "a presumption in favor of the Government's evidence," would not offend the Constitution "so long as that presumption remained a rebuttable one. . . ." *Id.* at 534.

The plurality's position rested on the assumption "that a District Court would proceed with the caution that [the plurality] indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental." *Id.* at 539. It is this expectation of prudential and incremental

factfinding, in combination with the requirements of notice and a fair opportunity to rebut the government's evidence, that forms the backbone of the due process requirements in enemy combatant proceedings.

**ii. The District Court Properly Applied The *Hamdi* Framework**

The District Court fulfilled the requirements of the *Hamdi* framework by requiring the government to give factual notice of the basis for Petitioner's detention and a fair opportunity to rebut the government's allegations.

**1. The Murphy Declaration Provides Sufficient Notice Of The Factual Basis For Petitioner's Detention And Evidence To Indicate That Petitioner Is An Enemy Combatant**

The Court of Appeals determined that "important differences in the factual circumstances" of *Hamdi's* and Petitioner's respective detentions may have entitled Petitioner to more procedural protections than *Hamdi* received. (R. at 27-28.) Accordingly, it held that the district court erred in "simply accept[ing] the hearsay Murphy Declaration as the most reliable evidence" without engaging in further inquiry regarding the potential burden on the Executive. (R. at 23.) This conclusion misapplies *Hamdi* in two important ways. First, it misunderstands the Murphy Declaration as the government's ultimate and final exhibit in the evidentiary process, rather than as fulfillment of the notice requirement and as the single first step "in a factfinding process that is both prudent and

incremental." *Hamdi*, 542 U.S. 533, 539. Second, it ignores the strength of the Murphy Declaration, which provides factual claims that are rebuttable without any "intru[sion] on the sensitive secrets of national defense." *Id.* at 532.

Aside from functioning to fulfill the notice requirement mandated by *Hamdi*, the Murphy Declaration serves to establish the foundation upon which future proceedings may take place in an enemy combatant's habeas case. There is no requirement in *Hamdi* or its supporting authority that the government prove at the outset that a hearsay declaration "is the most reliable available evidence" to establish the propriety of designating a detainee as an enemy combatant, contrary to the holding of the court below. (R. at 27.) Rather, *Hamdi* states that such evidence is acceptable "so long as it permits the alleged combatant to present his own factual case to rebut the Government's return." 542 U.S. at 538 (emphasis added). Moreover, the district court did not run afoul of the Constitution by allowing a "presumption in favor of the Government's evidence," as "that presumption remained a rebuttable one and fair opportunity for rebuttal [was] provided." Thus, *Hamdi* does not, as concluded below, require the district court to rest its inquiry on a test of whether the government's initial evidence was the "most reliable available evidence." *Hamdi*, 542 U.S. at 534. Rather, the appropriate

inquiry is whether the introduction of hearsay evidence allows for a "fair opportunity for rebuttal." *Id.* at 534.

Here, the Murphy Declaration is replete with factual assertions that are rebuttable by Petitioner without requiring "certain procedures that have questionable additional value in light of the burden on the Government." *Hamdi*, 542 U.S. at 534; *see also Mathews v. Eldridge*, 424 U.S. at 335. For example, the assertion that Petitioner "attended an al Qaeda-run terrorist training camp in Afghanistan for 18 months between 1996 and 1998" is rebuttable (if untrue) without requiring the government to put an intelligence gatherer on the stand for cross-examination. (App. A, ¶ 6.) Petitioner can simply describe and verify his whereabouts during that time period. Similarly, the assertion that Petitioner's laptop contained "highly technical information. . . consistent with documented interests of al Qaeda and other terrorist groups" is rebuttable (if untrue) by a credible explanation for why Petitioner's laptop contained "research regarding use of chemicals as weapons of mass destruction." (App. A, ¶¶ 12, 13.) To the extent that the district court finds that Petitioner's rebuttals cast doubt on the veracity of the Government's factual assertions, *Hamdi* allows the court to engage in further "prudent and incremental" factfinding. 542 U.S. at 539. Where the proceedings have revealed that the Government's assertions cannot be rebutted,

the court retains the authority via *Hamdi* to require the government to show that the hearsay declaration is the "most reliable available evidence." *Id.* at 534.

In sum, the court below erred in requiring the government to show more than is necessary to begin a factfinding process that *Hamdi* holds to be within the discretion of the district court. 542 U.S. at 539.

**2. The Court Erred In Balancing The Parties' Interests By Failing To Give Due Consideration To The Government's Interest In Protecting Sensitive Information**

The court below erred in holding that the factual differences between the circumstances of Petitioner's capture and *Hamdi*'s capture warrant the application of different procedures.

First, the court concluded without support that the "practical burden placed on the government in producing the evidence against Ahmed is . . . dramatically lessened" by the fact that Petitioner was apprehended in the United States. (R. at 27.) This argument accords undue weight to the supposition that the evidence against Petitioner is not "buried under the rubble of war" without regard to the government's compelling interest in protecting sensitive information about the means by which intelligence is gathered. *Hamdi*, 542 U.S. at 532. The argument ignores that "[t]he Government has a compelling interest in protecting . . . the secrecy of information important to our national security." *C.I.A. v. Sims* 471 U.S. 159, 175 (1985),

quoting *Snepp v. United States*, 444 U.S. 507, 509 (1980). The government's compelling interest in keeping secret the means by which intelligence was collected against Petitioner should not be deemed less compelling simply because it is less likely that the intelligence is "buried under the rubble of war."

As for Petitioner's interests, the circumstances under which Petitioner was captured have no logical bearing on the process he is due. The Court below held that the "risk of erroneous deprivation" of liberty was higher for Petitioner than for Hamdi because Petitioner was "captured within the United States by civilian authorities who have not adhered to the protocols of criminal procedure." *Mathews v. Eldridge*, 424 U.S. at 335; Record at 25. This distinction is nowhere to be found in *Hamdi*, and for good reason. The *Hamdi* plurality was particularly concerned with the risk of erroneous deprivation of liberty when it came to "the errant tourist, embedded journalist, or local aid worker," suggesting that the risk of erroneous deprivation of liberty was at its peak during the fog of war. *Hamdi*, 542 U.S. at 534. Here, Petitioner was apprehended on the basis of presumably actionable intelligence that was collected, marshaled, and presented in the Murphy Declaration. If anything, the risk of erroneous deprivation is lower in this particular circumstance, where the allegations against Petitioner did not arise out of the confusion of battle.

In sum, the government's interests in following the *Hamdi* framework remain compelling, and rebalancing the parties' interests subverts the clear direction of *Hamdi*.

**3. The Process Employed By The District Court Thus Far Is Consistent With General Application Of Habeas Review**

Petitioner apparently seeks an evidentiary process akin to that of a criminal trial, despite the *Hamdi* plurality's express holding that an enemy combatant is entitled to contest his designation under the "skeletal outline" of habeas review provided in 28 U.S.C. § 2241 and its companion provisions. *Hamdi*, 542 U.S. at 525. To require the government to make an initial showing as to whether the Murphy Declaration is the "most reliable available evidence" would contravene this process as interpreted by the *Hamdi* plurality. *Hamdi*, 542 U.S. at 525.

The habeas process as outlined by the *Hamdi* plurality requires that a petitioner have the "fair opportunity to *rebut* the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533 (italics added). This formulation is in accord with the plurality's explanation that it would not offend the Constitution to require a petitioner to rebut the government's credible evidence "with more persuasive evidence" of his own. *Id.* at 534. Because "the habeas petitioner generally bears the burden of proof," the habeas process as

outlined by the *Hamdi* plurality is designed to put a burden on the petitioner. *Garlotte v. Fordice*, 551 U.S. 39, 46 (1995).

The District Court applied this framework, giving Petitioner 60 days to offer persuasive evidence to rebut the government's factual claims. (R. at 9.) Petitioner declined to do so. To entertain this refusal to participate in the process is to shift the initial burden of proof to the government, directly contradicting the *Hamdi* framework and the general application of habeas review. If it were the case that Petitioner was unable at the outset to refute the government's claims without access to the government's evidence, a court employing a "prudent and incremental" approach could revisit the necessity of keeping secret the evidence underlying the factual assertions. *Hamdi*, 542 U.S. at 539. It could go further and demand production and, if needed, in camera review. But to require this production at the outset – and to ignore Petitioner's refusal to rebut even facts that are clearly knowable by him – is to shift the initial burden of proof to the government in contradiction of the *Hamdi* framework and general habeas principles. This is an unnecessary and unsupported refutation of the principles set out in *Hamdi*.

#### **IV. Conclusion**

For the foregoing reasons, the United States respectfully requests that this Court reverse the Court of Appeal and affirm the holding of the district court.