

No. 08-11144

IN THE

Supreme Court of the United States

October Term, 2009

BURHAN UDDIN AHMED,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

Team # 3045

Counsel for Respondents

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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Opinions Below

The opinion of the circuit court is reproduced in the Record beginning at 5. The holding of the district court is summarized by the circuit court in the Record at 9. The Declaration of John R. Murphy is included in the Record, at 47.

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C.A. § 1254, granting a writ of certiorari.

Relevant Constitutional Principles and Statues

U.S. Const. Amend V and Pub. L. No. 107-40, 115 Stat. 224 (2001)(AUMF) are both relevant and appear in the Record at 2. Also relevant is 18 U.S.C. 4001(a), providing "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

Statement of the Case

Petitioner Burhan Uddin Ahmed, a citizen of Pakistan, lawfully entered the United States in September of 2001 to begin a veterinary medicine degree at Wilson University in Wilson, East Dakota. Record, at 7. Ahmed was arrested in January of 2002 as a material witness related to the 9/11 attacks and detained in Wilson. *Id.* Ahmed was charged in November of 2002

with possession of counterfeit Social Security cards with intent to defraud, and a later charge was added for making a false statement to the FBI. *Id.* Ahmed denied the allegations and a trial date was set for July, 2003. In June of 2003, the President issued an order that stated he had determined Ahmed was an enemy combatant with close ties to al Qaeda, and he was transferred at that time to military custody. *Id.*

Ahmed filed a habeas corpus petition following his transfer to military custody, and asserts that his detention is unlawful and the government must either release him or file criminal charges against him. *Id.*, at 8. Alternatively, Ahmed argues he must be given a hearing to challenge the factual basis for his enemy combatant designation. *Id.* The case was heard before a district court, and the court was provided with a hearsay affidavit, the Declaration of John R. Murphy (Murphy Dec.), who is the Director of the Joint Task Force for Combating Terrorism, describing Ahmed's involvement with Al-Qaeda. *Id.* The affidavit reports evidence of attendance at an al Qaeda-run terrorist training camp, and financial backing from the financial facilitator of the 9/11 attacks, among other details. *Id.* The district court decided that the government was permitted to detain Ahmed and appointed a magistrate judge to determine what process Ahmed should be afforded to challenge the

factual basis of his detention. *Id.* The judge determined that the government must provide Ahmed with notice of the factual basis of his detention, and that if the government could provide credible evidence then the burden of proof would shift to Ahmed to provide more persuasive evidence refuting his designation as an enemy combatant. *Id.*, at 9. Ahmed was given 60 days to provide this rebuttal evidence. He responded by denying the allegations but never producing a single piece of evidence, claiming that the process afforded him was unconstitutional. *Id.* As he did not present any evidence to counter the government's affidavit, the magistrate judge ruled that Ahmed's petition should be denied. *Id.*, at 10.

After an initial unsuccessful appeal, Ahmed requested a rehearing, and the court agreed to rehear his appeal en banc. *Id.* Upon rehearing, the court ruled that the power for the government to detain Ahmed as an enemy combatant was authorized by the AUMF. *Id.*, at 28. However, the court also ruled that Ahmed was not awarded sufficient process by the district court to challenge his designation as an enemy combatant. *Id.* The district court's ruling on that matter was therefore reversed and remanded for further proceedings. Ahmed appeals the decision of the circuit court on the matter of the legality of his detention.

Summary of Argument

I. The President's authority to detain enemy combatants in its current struggle against the perpetrators of the attacks of 9/11 was given by Congress through the AUMF. The Executive may not detain citizens unless pursuant to an Act of Congress, and this Court has previously held that the AUMF provides such authorization. The inclusion of an al Qaeda "sleeper agent" in the realm of those authorized to be detained is a logical and necessary conclusion. Restricting the availability of detention in the narrow way argued by Ahmed would run counter-intuitive to the purpose of the AUMF by restricting domestic al Qaeda operatives from detainment. The circuit court properly upheld the constitutionality of Ahmed's detention, as he is within the definition of "enemy combatant" as the term has been defined in recent judicial decisions.

II. The circuit court erroneously concluded that Ahmed was afforded more judicial process than afforded by the district court. The process afforded Ahmed is consistent with the process afforded to the petitioner in *Hamdi*. The two cases present substantially similar policy concerns. This Court has held that alternative habeas corpus procedures may be constitutional, provided that they offer certain protections. These protections are found in Ahmed's case. That he chose not

to make use of the process afforded him should preclude Ahmed from seeking review in a federal court.

ARGUMENT

I. The Twelfth Circuit Court of Appeals correctly held that the President was authorized to detain Ahmed as an enemy combatant.

A. Congress authorized Ahmed's detention under the AUMF.

In the aftermath of the terrorist attacks of September 11, 2001 which took nearly 3000 American lives, Congress enacted the AUMF 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." Pub. L. No. 107-40, 115 Stat. 224 (2001)(AUMF). The enumerated purpose of such authorization was "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons". *Id.*

Various courts have grappled with the extent of authority granted by the AUMF. In *Hamdi v. Rumsfeld*, a plurality of the Court found that the AUMF granted the President power to detain "enemy combatants," and the Court further explains that the "necessary and appropriate force" includes "detention of individuals falling into the limited category we are

considering, for the duration of the particular conflict in which they were captured." 542 U.S. 507, 518 (2005). This has traditionally been accepted under the law of war as incident to any armed conflict as related by the *Hamdi* court: "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incident[s] of war. *Id.* (internal quotation marks omitted).

In *Hamdi*, the petitioner was an American citizen captured on the battlefield of Afghanistan wielding an assault rifle against American troops. *Id.*, at 510. The concurring opinion of this circuit court and Ahmed's argument erroneously interpret the *Hamdi* plurality's authorization of detention in the "narrow circumstances considered" in Hamdi's factual scenario as an exhaustive record of circumstances in which Congress authorized detention.

Writing for the concurrence, Judge Gray uses the limiting language of *Hamdi* to exclude Ahmed from the reach of the AUMF because he was not captured bearing arms against American troops in a foreign land, but in his home on American soil. Record at 32-33. However, the *Hamdi* plurality declines to conclusively define "enemy combatant" for the purposes of deciding the AUMF's reach. Specifically, the court states that the "permissible

bounds of the category will be defined by the lower courts as subsequent cases are presented to them." *Hamdi*, 542 U.S. at 522 n.1. Lower court rulings are discussed below.

Applying the restrictive view in Judge Gray's opinion would contradict the express intent of Congress in enacting the AUMF. The resolution states that its purpose is to "prevent and deter acts of international terrorism against the United States." AUMF Preamble. The resolution specifically references the 9/11 attacks and was clearly enacted in response to such attacks. Utilizing the concurrence's interpretation would prohibit the detention of the 9/11 attackers themselves as they were residing within the United States legally at the time they carried out their plans and were not engaged in an armed conflict against the United States. *The 9/11 Commission report: Final Report of the National Commission on Terrorist Attacks upon the United States* at 214 (W.W. Norton & Co., Inc.). Congress clearly intended for the AUMF to authorize "necessary and appropriate force" against those responsible for the 9/11 attacks and by extension people similarly situated. Congress could not have intended to limit authorization to those associated persons captured only on foreign battlefields as this would severely hamper the ability of the Executive to prevent and deter "acts

of treacherous violence" similar to those that occurred on September 11, 2001.

In *Padilla v. Hanft*, the Fourth Circuit Court of Appeals also concluded that Joes Padilla was an enemy combatant whose status as an American citizen did not preclude detention. 423 F.3d 386 (2005). Padilla was captured on American soil, but had in the past been "armed and present in a combat zone during armed conflict." *Id.*, at 390 (internal quotation marks omitted). The court further notes that detention in that case was permissible "to prevent a combatant's return to the battlefield" *Id.*, at 391 (internal quotation marks omitted). Ahmed will likely argue, and Judge Gray actually wrote in his concurring opinion, that Ahmed is not a threat to return to a battlefield because he was never captured on a field of battle in the first place. Record, at 34. This argument would defeat the purpose of the AUMF and substantially prevent the government from taking action to thwart attacks similar to those of 9/11. In the current military struggle against al Qaeda, the term "battlefield" should essentially been expanded to include any location where al Qaeda threatens to strike American interests. Although the majority of armed hostilities today take place against the Taliban and al Qaeda in Afghanistan, the threat of an attack on the homeland is at the heart of the AUMF.

The concurrence also attempts to distinguish the two main AUMF cases by examining their reliance on *Ex parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, the Supreme Court held that an American citizen and other Nazi members were enemy combatants because they "associate[d] 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 [combatants] within the meaning of . . . the law of war." *Id.*, at 37-38. Judge Gray erroneously interprets *Hamdi* and *Padilla* in arguing that the association with the military arm of a government as held in *Quirin*. Record at 34. In fact, in addition to his association with the Taliban, the *Padilla* court describes the petitioner's affiliation with a hostile force as an "association with *al Qaeda* in Afghanistan and Pakistan" *Padilla*, 423 F.3d at 391 (emphasis added). In *Hamdi*, the discussion of the "military arm" is offered as a sufficient, but not necessary, factor in determining the petitioner's status. *Hamdi*, 542 U.S. at 519. Also, *al Qaeda* may itself be considered its own military arm. President Obama, as recently as May of 2009, has stated that "*al Qaeda* terrorists and their affiliates are at war with the United States, and those we capture -- like other prisoners of war -- must be prevented from attacking us again." *Transcript of President Obama's national security address*. 5 (May 20, 2009),

<http://www.cnn.com/2009/POLITICS/05/21/obama.transcript2/index.html>.

If Congress had intended that only those associated with the military arm of a government were eligible for detention under the AUMF, then al Qaeda, the principle organization for the 9/11 attacks, would not fall under the grant of power of the AUMF. However, the resolution specifies that beyond "nations", "organizations" and "persons" that took part in the attacks were within the grasp of the Presidential authority conferred. AUMF. Also, the *Hamdi* plurality stated 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." 542 U.S. at 518. This statement implies that al Qaeda members are certainly within the scope of the congressional authorization, and it is actually the Taliban's status that is less clear.

More recently, as described in *Hamdi*, lower courts "have begun to examine the permissible bounds of the government's authority to detain those being held at Guantanamo." *Hamlily v. Obama*, 616 F.Supp.2d 63, 67 (D.D.C. 2009)(internal quotation marks omitted). Although not binding on this Court, the more recent opinions are instructive in accordance with the wishes of

the *Hamdi* plurality. In *Hamdi*, the court interpreted the AUMF as authorizing detention based solely on whether the individual was "part of" either the Taliban or al Qaeda. *Id.*, at 69. The court further explained that it "will not attempt to set forth an exhaustive list because such determination must be made on an individualized basis. *Id.*, at 75. The same court has held that "[m]ere sympathy for or association with an enemy organization does not render an individual a member." *Gherebi v. Obama*, 609 F.Supp 2d 43, 68 (2009). The *Gherebi* court further specified that the "key question is whether an individual receives and executes orders from the enemy force's combat apparatus, not whether he is an al Qaeda fighter." *Id.*, at 69.

In the present case it is clear that Ahmed was a part of al Qaeda under this definition. Before entering the United States he had trained with al Qaeda and met with top members of the organization. He also volunteered to be martyred or to do whatever else was asked of him. Murphy Declaration. This certainly constitutes receiving orders from the organization's combat apparatus. Further reception and executing of orders can be inferred from the facts that Ahmed moved to the United States, studied chemicals as weapons of mass destruction, obtained false Social Security numbers, and maintained contact with a high-ranking al Qaeda officer. *Id.*

The argument has also been made that the case at hand is similar to *Ex parte Milligan*, 71 U.S. 2 (1866). In that case the court found that a man captured while assisting Confederate forces was not a prisoner of war and therefore not subject to military trial. *Id.*, at 118. The concurrence quotes the *Hamdi* plurality's description of *Milligan* in postulating that "[h]ad *Milligan* been captured while he was assisting the Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522. However, the concurrence fails to recognize that the *Hamdi* plurality continues by saying that the *Quirin* Court "dismissed the language of *Milligan* that the petitioners had suggested prevented them from being subject to military process" and that *Quirin* "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" *Id.*, at 522-523. Also, as the circuit court pointed out in its majority decision, there "is a critical difference" between *Milligan* and the present case, in that Congress never authorized use of force against the organization involved in *Milligan*. *Record*, at 17; referencing *Milligan*, 71 U.S. at 6. As discussed above, Congress has authorized use of force against al Qaeda through the AUMF. Finally, *Milligan* can be distinguished by the fact that the

"petitioners were never enlisted, commissioned, or mustered into the service of the Confederacy; nor had they been within the rebel lines, or within any theatre of active military operations; nor had they been in any way *recognized by the rebel authorities as in their service.*" *Id.*, at 39 (emphasis added). Ahmed's case presents a much different scenario, as he came to the United States at the behest of al Qaeda, with their funding, and clearly recognized by al Qaeda to be in their service.

Judge Gray, and likely Ahmed as well, also claims that the AUMF does not authorize indefinite detention of aliens because a more specific authorization is found in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L 107-56, 8 U.S.C. 1226(a) (Patriot Act). This interpretation is flawed. Although the Patriot Act authorizes detention, it is in relation to a separate group of people than the AUMF. The AUMF specifically authorizes detention of enemy combatants: those responsible or associated with the 9/11 attacks for the duration of the armed conflict with those people. AUMF. The Patriot Act grants the Attorney General power to detain those suspected of terrorist activity, espionage, or "any other activity that endangers the national security." 8 U.S.C. 1226(a)(3)(B). Since those sought to be covered by the Patriot Act's terrorist

detention provisions need not be part of an organization associated with the 9/11 attacks, they are not classified as enemy combatants and are a wholly separate group of potential terrorists from those specified in the AUMF. Therefore, it is clear that the Patriot Act does not prohibit the detention deemed to be "necessary and appropriate force" under the AUMF.

Ahmed was captured on American soil without bearing arms against the United States. However, because he is part of al Qaeda the AUMF authorizes his detention as an enemy combatant.

B. The Constitution authorizes Ahmed's detention.

It is undisputed that the Constitution guarantees that no "person" shall "be deprived of life, liberty, or property without due process of law." U.S. Const. Amend V. Further, the Supreme Court has consistently held that certain protections afforded by the Constitution extend to foreign nationals who legally reside within the United States and its territories. See *e.g. Johnson v. Eisentrager* 339 U.S. 763, 771 (1950) ("Mere lawful presence in the country creates an implied assurance of safe conduct and gives [an alien] certain rights"). As pointed out by Judge Watts in writing for the Court of Appeals plurality, it is only in narrowly defined exceptions that this Constitutional right is abridged. Record at 11. Detention of enemy combatants at the behest of Congress during military

hostilities is one of these exceptions. *Hamdi*, 542 U.S. at 517. In accordance with the separation of powers under the Constitution the legislature statutorily memorialized its check on the Executive's detention of citizens with the Non-Detention Act, 18 U.S.C 4001(a). It simply states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." In *Hamdi*, the plurality ruled "the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe . . . and that the AUMF satisfied §4001(a)'s requirement that a detention be pursuant to an Act of Congress." *Id.* (internal quotation marks omitted). As discussed above, the Court's qualification that the detention be in the "narrow category we describe" does not bear on the facts of this case.

Even if Ahmed is afforded the full Constitutional protections of an American citizen because he is a foreign national within American territory, his detention is still permitted by the Constitution because it is authorized by an Act of Congress by way of the AUMF.

II. The circuit court erred in its decision that Ahmed did not receive the due process afforded him by the Constitution.

Ahmed initially appealed the district court's decision on the grounds that having to "prove his own innocence" was inherently unconstitutional. Record, at 9. As mentioned in part I-B, above, as a foreign national detained on American soil, Ahmed is afforded the protection of the Due Process Clause. However, the district court correctly applied the framework this Court established for reviewing habeas petitions by domestically-held enemy combatant detainees in *Hamdi v. Rumsfeld*. 542 U.S. at 533. This framework affords Ahmed all the process he is legally due. The same policy-balancing concerns exist here as did in *Hamdi*, the district court specifically allowed for the possibility of a traditional adversarial hearing, and the major concerns of this Court regarding the adequacy of process afforded enemy combatant detainees are not at issue.

A. The factual scenario presented in Ahmed's case presents substantially similar policy concerns as in *Hamdi*.

In its decision in *Hamdi v. Rumsfeld*, a plurality of this Court held that an enemy combatant is entitled to be presented with a credible factual basis for detention, and if such credible evidence is produced by the government, the detainee

then has a burden to produce more persuasive evidence. *Id.* Further, the *Hamdi* court allowed that a hearsay summarization by a "knowledgeable affiant" may serve as sufficient notice of the factual basis of the combatant's detention to trigger the shifting of the burden to the defendant. *Id.*, at 534. The Court allowed this and a possible "presumption in favor of the government's evidence" in light of the concern 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 533.

In the present case, the circuit court distinguishes the process due Ahmed from the process afforded Hamdi based on the circumstances of Ahmed's capture. Record, at 27. The court takes great pains to highlight that Ahmed was not captured on a battlefield by military troops, but at his home by civilian forces. *Id.* However, the circumstances and competing interests are more similar between this case and *Hamdi* than the Court of Appeals recognized.

Our nation is at war with Al Qaeda and the Taliban, and it comes as no novel idea that this particular war is unlike others in our past. The attacks of September 11, 2001 were set in motion inside the United States by persons affiliated with Al-Qaeda who entered the U.S. legally. *The 9/11 Commission report:*

Final Report of the National Commission on Terrorist Attacks upon the United States at 4, 214 (W.W. Norton & Co., Inc.). As mentioned earlier, Congress passed the AUMF to grant the President the power to, essentially, go to war with those persons and organizations responsible for those attacks. Preventing similar attacks planned and perpetrated by persons residing in the United States would surely fall within the scope of the President's authorized use of force. As such, the same concerns voiced in *Hamdi*-- that full discovery would disrupt our ability to wage this war in foreign theaters-- are valid in the case of waging this war at home. The factual declaration submitted against Ahmed is based on intelligence gathered by the FBI and the Department of Defense. Murphy Dec. Requiring the government to immediately come forward with the specific sources of its information in every case where an enemy combatant is detained on home soil would present a significant impediment to future investigations by exposing precisely the "sensitive secrets of national defense" sought to be protected by the balancing test undertaken in *Hamdi*. 542 U.S. at 532.

The petitioner will likely argue that the language in *Hamdi* refers plainly to "discovery into military operations", not operations by civilian agencies like police and the FBI. *Id.* However, the Murphy Declaration clearly states that at least a

portion of its information comes from the Department of Defense, a military wing of the government. More crucially, a policy that would only protect military intelligence personnel from burdensome discovery would yield counterproductive results. Disrupting home-grown al Qaeda plots often requires undercover work on the part of intelligence agencies, and discovery that would compromise the identities or methods of the agents involved would hamper the agencies' abilities to conduct this work. Eric Lichtblau, *Trying to Thwart Possible Terrorists Quickly, F.B.I. Agents Are Often Playing Them*, New York Times, 30 May 2005. To avoid the risk of exposing its operatives or other sources, the government would likely have to result to using its military intelligence personnel in investigations into U.S.-based terrorist plots, distracting the military from waging its war abroad in exactly the way the *Hamdi* court attempted to prevent.

Any meaningful factual review of the Murphy Declaration would surely involve inquiry into the basis of the assertions that Ahmed trained with al Qaeda in the use of poisons, had relationships with al Qaeda leaders, received funding from them, and entered the United States under commission of al Qaeda. Murphy Dec. Investigation into these allegations would be essentially similar to investigation of the content of the Mobbs

Declaration in *Hamdi*. 523 U.S. at 513 ("[Hamdi] affiliated with a Taliban military unit and received weapons training"). As concluded in *Hamdi*, such investigation would hinder the military's ability to gather future intelligence and to continue to wage war against the Taliban and al Qaeda.

The circuit court proclaims that the government must produce evidence that the Murphy declaration is the most reliable form of evidence. There is no holding in *Hamdi* decision which requires evidentiary proof that a hearsay declaration be the most reliable evidence available before it may be admitted. *Hamdi* only requires that the evidence offered by the government be credible and that it not upset the balance of interests discussed at length by the Court, a balance which is similarly-poised here. *Id.*, at 534.

The prevailing tactical military interest in detaining an enemy combatant is prevention of his return to battle. *Id.*, at 518. As part of differentiating this case from *Hamdi*, the circuit court sought to highlight that Hamdi was captured in a theater of war, and so if released was very likely to return to that theater of war in opposition of Coalition forces. Report, at 22. This threat is no greater with a soldier captured on the front lines than with a "sleeper agent" captured while preparing for a terrorist plot at home. That Ahmed needed only a few

months in this country and access to a laptop computer in order to, allegedly, begin to plot a terrorist attack only underlines how simple it would be for a released enemy combatant to launch another attack from within this country. Even if released and deported, there is no logical impediment to Ahmed simply passing this knowledge and tactical planning on to another "sleeper agent". The burden of discovery on the government's ability to thwart terrorist plots and the risk of the mistakenly-released enemy combatant returning to do harm to the United States or its allies is substantially similar between this case and *Hamdi*. The process afforded Ahmed to challenge his detention should also be similar.

B. The *Hamdi* framework and the District Court's ruling provide for further process than has been offered to Ahmed to date, provided he can produce evidence to call the factual basis for his detention into doubt.

The magistrate judge appointed by the district court determined, based on the *Hamdi* decision, that if Ahmed could produce more persuasive evidence than the government's hearsay declaration then he was entitled to release or a full adversarial hearing. Report at 9. This Court, in the plurality's opinion in *Hamdi*, also recognized that the admission of a hearsay factual declaration would only be the first part of

the process afforded the detainee. 542 U.S. at 533. The Court's opinion in *Hamdi* references *Mathews v. Eldridge* (upon which the balancing-test of *Hamdi* is based) saying that this type of process sufficiently addresses the "'risk of an erroneous detention'...while eliminating certain procedures that have questionable value in light of the burden on the government". *Id.*, at 2649, quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976).

This balance between risk of wrongful detainment and burden to the government is highlighted by the circuit court's decision on the matter, in which the court stated that the risk of mistakenly identifying an enemy combatant is higher under the circumstances in which Ahmed was detained than under the circumstances in which Hamdi was detained. *Record*, at 27. If there were a substantially increased risk of erroneous detention by the government, the government would rightly be expected to undertake more burden in showing a factual basis for imprisonment. The court, however, gives no basis for the assertion that the risk of mistaken arrest is higher in Ahmed's situation than in Hamdi's. Hamdi was captured in a theater of war by armed forces personnel based on his possession of a gun, and only after being detained was he investigated by trained officers who determined his link to the Taliban. *Hamdi*, 542

U.S. at 510. The FBI and the Department of Defense, on the other hand, investigated Ahmed *before* his transfer to military custody as an enemy combatant. Record, at 6. If anything, it would seem that there was a lesser chance of the government mistakenly detaining Ahmed as an enemy combatant than Hamdi at the time of his confinement.

The district court's appointed magistrate judge afforded a guarantee of a full adversarial hearing should Ahmed be able to call his enemy combatant status into doubt through more persuasive evidence. Record, at 9. Given that the government's only evidence was a hearsay declaration, this evidentiary requirement does not impose a great burden on Ahmed. It is likely that any concrete, factual evidence explaining his research into chemical weapons or the source of his academic funding, for example, would be extremely persuasive by comparison to the declaration presented to Ahmed. This guarantee of a full-blown adversarial trial should he be able to carry a low burden of proof is more process than afforded to other foreign nationals that have been detained by the United States on home soil in the past as enemy combatants. *Quirin*, 317 U.S. at 7 (requiring defendant Haupt be tried by military tribunal).

The Murphy Declaration does not represent the entirety of the process given to Ahmed. It is, conversely, a "gatekeeper" of sorts, a rebuttable statement used by the district court in keeping with the *Hamdi* framework to distinguish those cases that merit full discovery and habeas proceedings from those that do not.

C. The chief concerns voiced by this court in other post-*Hamdi* decisions regarding the due process for enemy combatant detainees are not at issue in this case.

The vast majority of enemy combatant detainees have been and currently are still being held at the United States Naval Station in Guantanamo Bay, Cuba, and after the *Hamdi* decision the Deputy Secretary of Defense established the Combatant Status Review Tribunals (CSRTs) to determine whether the detainees were being lawfully held as enemy combatants. *Boumediene v. Bush*, 128 S.Ct. 2229, at 2241 (2008). Congress subsequently enacted the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, which limited the scope of habeas corpus review available to an enemy combatant detained at Guantanamo. *Boumediene*, 128 S.Ct at 2241 and 2266. The circumstances of the Guantanamo detainees' capture, in the vast majority, present a different factual scenario than the one faced by this Court in the instant case, as Ahmed was not captured in a foreign theater of war and is not

being held outside the contiguous United States. *Boumediene* is nonetheless probative, and establishes that an adequate alternative can exist for a traditional habeas corpus process. *Id.*, at 2274. Also, this Court found that, except in cases of undue delay, federal courts should refrain from hearing a Guantanamo enemy combatant's habeas petition until after the government, through the CSRT process, has had a chance to review his status. *Id.*, at 2276. This deference to specially-designed review processes should be upheld in Ahmed's case as well.

1. The process afforded Ahmed by the district court sufficiently addressed the problems this Court found with the CSRT/DTA process applicable to Guantanamo detainees.

Boumediene identified several major constitutional flaws in the DTA, and ruled that it did not afford the detainees the proper process guaranteed by the Constitution. The chief concerns voiced by the Court were that there was no opportunity for the accused to present extrinsic exculpatory evidence, challenge their detention, and request an order of release. *Id.*, at 2275. The CSRT process was largely based on admission of hearsay testimony, akin to the Murphy Declaration as it pertains to Ahmed. *Id.* At a CSRT, the detainee was not provided with an attorney or an advocate, and so was limited in his options to raise evidence in his defense or to cross-

examine. *Id.* Crucially, should a detainee seek to challenge his status as determined by the CSRT, this Court found the DTA restricted the detainee from presenting any relevant evidence outside of the CSRT record. *Id.*, at 2272. Also, the DTA never explicitly provided an available option for the government to release the detainee after review. *Id.*

In sum, though a Guantanamo detainee was afforded the "presentation of the factual basis for their detention" as required by the *Hamdi* ruling, the detainee was not given a "meaningful opportunity" to rebut that factual basis under the DTA as determined by this Court. *Id.*, at 2266 and 2274; also *Hamdi*, 542 U.S.at 533. By contrast, Ahmed was not only presented with the factual basis for his detention, but never denied access to counsel, encouraged to provide extrinsic exculpatory evidence, and had the availability of full release or complete adversarial trial upon introduction of such evidence, provided it was at least "more persuasive" than the hearsay Murphy Declaration. Record, at 9. Ahmed may argue that he cannot "meaningfully contest" the validity of his contention without having an opportunity to challenge the credibility of the information on which the charges against him are based. However, the Mobbs Declaration, on which Hamdi's detention was based, was even less forthcoming about the details of the

charges against him than the Murphy Declaration is with regards to the charges against Ahmed. This Court, nonetheless, admitted the affidavit and decided that the opportunity for Hamdi to present his own factual account was sufficient opportunity to "meaningfully contest" detention. 542 U.S. at 538. The procedure ordered by the magistrate judge was exactly the opportunity for Ahmed to challenge his detention that this Court decided the Guantanamo inmates were not being afforded by the DTA process.

2. Ahmed should be required to participate in the review process ordered by the magistrate judge before a federal court considers a habeas corpus petition.

This Court ruled in *Boumediene* that the detainees in question did not have to exhaust their review options before appealing their detention, based on the extraordinary delay that they had experienced in having their cases heard thus far. 128 S.Ct. at 2275. However, there is no evidence on record that any of these detainees were at fault for the almost six-year delay that they experienced in receiving due process. *Id.* By contrast, Ahmed was transferred to the military custody in June of 2003, and the Murphy Declaration was produced and presented to the magistrate judge in his case within a year's time. Record, at 7; Murphy Dec. This is a far cry from the delays

associated with the DTA and CSRT process in Guantanamo. The *Hamdi* framework provided a review process that was applicable to domestically-detained enemy combatants. Ahmed should be required to adhere to this review process and present his evidence before the magistrate judge in rebuttal of the Murphy Declaration. Any delay in receiving due process after the compilation of the Murphy Declaration has been the fault of Ahmed's failure to present evidence in his defense, under the assertion that he is due a full habeas proceeding.

The option for federal courts to devise alternate procedures for assessing habeas petitions has been approved of by this Court repeatedly. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (federal courts have the "power to 'fashion appropriate modes of procedure,' including discovery, to dispose of habeas petitions 'as law and justice require' ") (quoting *Harris v. Nelson*, 394 U.S. 286, 299-300 (1969)). This Court in *Boumediene* expressed clearly that its decision was "not to be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs". 128 S.Ct. at 2276. Instead, the Court favored a presumption in favor of a "sensible" review process unless an unreasonable delay or inconvenience would result. *Id.* The instant case simply does not provide a reason to circumvent the *Hamdi*

framework and proceed directly to an adversarial hearing before Ahmed offers sufficient evidence to rebut the Murphy Declaration.

Conclusion

Ahmed is properly within the category of persons authorized to be detained as "enemy combatants" under the AUMF and the ruling of the circuit court should be upheld.

Because Ahmed's case presents substantially similar interests to be weighed as in *Hamdi*, and because the process afforded Ahmed addresses this Court's chief concerns for the Due Process rights of enemy combatants in *Boumediene*, the judgment of the circuit court should be overturned and Ahmed's petition denied.