

No. 08-11144

In the Supreme Court of the United States

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BURHAN UDDIN AHMED,  
PETITIONER,

V.

UNITED STATES OF AMERICA,  
RESPONDENT.

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

BRIEF FOR RESPONDENT

TEAM 4777  
Counsel for Respondent

## 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?

**Parties to the Proceeding**

Petitioner:

BURHAN UDDIN AHMED, a citizen of Pakistan, is presently being detained without charge at the Army Regional Consolidated Detention Facility in Souds, East Dakota. He has been held by the government of the United States since on or about June 13, 2003.

Respondent:

UNITED STATES OF AMERICA.

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## Statement of Basis for Jurisdiction

The United States Court of Appeals for the Twelfth Circuit entered a Judgment on November 24, 2008. Petitioners timely sought Certiorari, which this Court granted on October 02, 2009.

## Relevant Constitutional and Statutory Provisions

Pub. L. No. 107-40, 115 Stat. 224 (2001)  
September 18, 2001  
AUTHORIZATION FOR USE OF MILITARY FORCE

Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements--

(1) SPECIFIC STATUTORY AUTHORIZATION.--Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.--Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001. Pub. L. No. 107-40, 115 Stat. 224 (2001)

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Statement of the Case

On September 11, 2001, al Qaeda a terrorist network hijacked commercial airliners and used them as missiles to attack civilian targets in the United States. Al Qaeda operatives killed 3,000 people. Congress responded a week later by passing 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" al Qaeda. AUMF, 115 Stat. 224.

Appellant Burhan Uddin Ahmed, a citizen of Pakistan, entered the United States three days prior to the September 11th attacks. To obtain entry, Ahmed claimed a desire to pursue a doctor of veterinary medicine degree at Wilson University. Four months later, federal agents arrested Ahmed as a material witness in the investigation of the September 11<sup>th</sup> attacks.

Ahmed was charged in the District of East Dakota with possession of counterfeit Social Security cards with the intent to defraud in November 2002. Ahmed was also charged with making a false statement to the FBI. Ahmed pled not guilty to all charges. On June 13, 2003, the government filed a motion to dismiss the indictment based on a Presidential order.

The order declared that the President 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." Also that Ahmed's detention by the military was "necessary to prevent him from aiding al Qaeda." He ordered the Attorney General to surrender Ahmed to the Secretary of Defense in order to "detain him as an enemy combatant." The District court granted the government's motion and Ahmed was transferred to military custody. The military has held Ahmed as an enemy combatant since that time. Hostilities are ongoing; hence, no determination has been made regarding Ahmed's repatriation.

Ahmed filed a petition for a writ of habeas corpus, under 28 U.S.C. § 2241, challenging his military detention as an "enemy combatant." The United States District Court of East Dakota denied Ahmed's petition. The United States Court of Appeals for the Twelfth Circuit panel denied his appeal. Upon Ahmed's motion for rehearing, the Twelfth Circuit vacated the panel opinion and heard the case en banc, where it affirmed the president's authority to hold Ahmed and found that the process afforded him was insufficient, remanding the case back to the

District court for further proceedings. Petitioner sought Certiorari, which this Court granted.

### **Summary of Argument**

Congress's Authorization for the Use of Military Force (AUMF) lawfully empowers the President with the full war power of the United States. It recognizes presidential authority under the Constitution to deter and prevent acts of international terrorism against the United States.

The AUMF is specific Congressional authorization for the Presidential exercise of the full war power, comparable to a declaration of war. The AUMF recognizes presidential authority under the Constitution to deter and prevent acts of international terrorism against the United States. Presidential war power is maximized and consolidated by the AUMF. Great deference must be afforded when examining this bifurcated plenary power.

The President is responsible to protect the people and territory of the United States, in time of war or threat, from the danger caused by enemy alien operatives. The classification and detention of enemy combatants applies only to those who pose a real danger to the United States. Aliens who "associate themselves with the military arm of the enemy" while receiving "its aid, guidance and direction" enter this country bent on

hostile acts are enemy belligerents. There have been few cases involving enemy combatants being captured on United States soil in the more than eight years since the September 11th attacks. Ahmed's detainment is necessary to protect against future attacks. The *Alien Enemy Act*, conveys expansive Presidential detention authority when "any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States.

The Patriot Act does not limit the AUMF. The Patriot Act applies only to those aliens charged with criminal offenses. Those enemy combatants who follow the rules of war are subject to detention only until the end of hostilities, and not to criminal sanctions. The Constitutional protections applicable to criminal defendants do not apply to Ahmed.

Constitutional due process is satisfied by the procedures offered by the District Court. Constitutional protections vary based upon legal status and allegiance to enemy organizations. Enemy aliens have fewer protections than citizens and civilians. Unlike citizens, alien rights are dependent upon conformity with United States society and laws. As compared to civilians, enemy combatants are "a continuing, present, and grave danger to the national security of the United States" based upon their allegiance to al Qaeda. See Executive Order. The *Hamdi* framework provides enemy aliens with higher protections than are granted

by the Constitution.

The specific process due depends upon individual circumstances of the case. Post-deprivation due process is appropriate in exigent circumstances like war. The military context of detainment is a crucial factor in balancing the competing government and private interests. The government's compelling interest in protecting citizens outweighs any private interest of aliens who are aligned with our enemies. Erroneous deprivation is mitigated by thorough investigation by counterterrorism agencies. Disclosure of this classified information would increase the risk of subsequent attacks.

Challenging an enemy combatant status is best achieved through an evidentiary hearing. The presentation of preliminary rebuttal evidence is necessary to evaluate the credibility of a habeas corpus claim. The burden placed upon enemy combatants is simply to make specific factual allegations as to why he is entitled to relief. If an enemy combatant cannot provide credible rebuttal evidence, his demurer is too vague to withstand a full adversarial hearing.

### Argument

- I. **The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes, and the Constitution allows, the 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.**

A. Congress's Explicit Authorization for the Use of Military Force (AUMF) lawfully empowers the President with the full war power of the United States.

1. The legislative intent and statutory construction used to create the Authorization for the Use of Military Force (AUMF) was deliberate and requires due deference.

Responding to al Qaeda's "acts of treacherous violence" on September 11, 2001, Congress enacted the Authorization for Use of Military Force (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." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress specifically stated the reason for enacting the AUMF: "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.*

The AUMF recognizes presidential "authority under the Constitution to deter and prevent acts of international terrorism against the United States." *Id.* It is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." *Id.* The Congressional determination is that al Qaeda will "continue to pose an unusual and extraordinary threat

to the national security and foreign policy of the United States." *Id.*, Preamble.

High import should be placed upon the legislative intent and statutory construction of the AUMF; it was a joint resolution of Congress which passed unanimously in the Senate and in the House by a vote of 420-1. Jennifer K. Elsea & Richard F. Grimmett, *Declarations of War and Authorizations for Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service report RL31133 (2006). Congress intended for the AUMF to apply to "organizations [and] persons," including non-traditional actors, e.g., al-Qaeda operatives like Ahmed. 115 Stat. 224. Commanding "necessary and appropriate force," Congress placed no express restriction on the methods or resources to be used. *Id.* There are no geographic parameters restricting the AUMF to battlefields. See *id.* Specific word choices and clear omissions in the AUMF are legislative intent not to restrain the President's power.

2. The AUMF is indistinguishable in its effect from a formal declaration of war.

The AUMF embodies Congressional authorization for the Presidential exercise of full war power, comparable to a declaration of war.<sup>1</sup> See 115 Stat. 224. It requires the President

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<sup>1</sup> Authorizations for use of military force were first used in 1798 and have continued to this day. Despite the numerous armed conflicts the United States has engaged in, the last formal

to "protect United States citizens both at home and abroad" and to use "United States Armed Forces against those responsible for the recent attacks" requiring the Executive to "exercise its rights to self-defense." *Id.*

The AUMF recognizes presidential "authority under the Constitution to deter and prevent acts of international terrorism against the United States." *Id.* Protecting "against foreign incursion-whether in the form of organizations which function, in some technical sense, as 'agents' of a foreign power, or in the form of organizations which, by complete dedication and obedience to foreign directives, make themselves the instruments of a foreign power-may not be denied to the national legislature." *Communist Party of U.S. v. Subversive Activities Control Bd.* 367 U.S. 1, 95-96, 81 S.Ct. 1357, 1410 (1961). "It matters not in what form such aggression and encroachment come." *Id.* at 96 (quoting *Chae Chan Ping v. U.S.*, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889)). Responding to the AUMF, the President declared "a state of armed conflict" exists with al Qaeda. Military Order, 66 Fed. Reg. 57,833, § 1(a) (Nov. 13, 2001).

B. Presidential war power is maximized by the AUMF.

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declaration of war was in 1942 against Rumania. However, it is armed conflict itself, not a declaration of war or authorization for use of military force, which invokes the laws of war. Elsea, *supra*.

The AUMF consolidates Constitutional war power in the President, by Congressional delegation. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct.863, 870 (1952) (Jackson, concurring). "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* Executive authority is a "spectrum running from explicit congressional authorization to explicit congressional prohibition." *Dames & Moore v. Regan*, 453 U.S. 654, 668, 101 S.Ct. 2972, 2981 (1981). The AUMF expressly delegates Congressional power and authority to the President. See 115 Stat 224. The AUMF increases Constitutional powers of the President in matters of war, foreign policy, and defense of the United States. *Cf. 323 U.S. at 579.*

Customary limitations are inapplicable when the "entity exercising the delegated authority itself possess independent authority over the subject matter." *Loving v. United States*, 517 U.S. 748,772, 116 S.Ct. 1737, 1750 (1996) (quoting *United States v. Mazurie*, 419 U.S. 544, 556-557, 95 S.Ct. 710, 717-718 (1975)). "The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & Southern Air Lines v. Waterman S. S. Corp.* 333 U.S. 103, 109,

68 S.Ct. 431, 435 (1948). Congress has broad latitude through the AUMF to vest authority when the President has "independent authority over the subject matter." *Loving v. United States*, 517 U.S. 748, 772, 116 S. Ct. 1737, 1750-1751 (1996).

Great deference is required when examining a combination of plenary power constitutionally delegated to Congress and the President. See, e.g., *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-322, 57 S.Ct. 216 (1936). When "Legislative and Executive powers are pooled obviously to the end" that "strategic" and "diplomatic" interests may be facilitated, "revision or overthrow by the courts" is not appropriate.<sup>2</sup> *Chicago & Southern Air Lines*, 333 U.S. at 109-110. As a result, the President's actions in detaining Ahmed as an enemy combatant are " 'supported by the strongest of presumptions and the widest latitude of judicial interpretation,' " and the burden of persuasion rests heavily upon any who might attack it. *Hamdi v. Rumsfeld*, 542 U.S. 507, 588, 124 S.Ct. 2633, 2679 (2004) (Thomas, dissenting) (quoting, *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (internal quotations omitted in original)).<sup>3</sup> "Few

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<sup>2</sup> Justice Thomas stressed that he did "not think that the Federal Government's war powers can be balanced away by this Court." *Hamdi*, 542 U. S. at 579 (2004) (Thomas, dissenting). Instead pointing out that it is Congress that constitutionally has that shared governance on matters of war and foreign affairs. See *Id.*

<sup>3</sup> Justice Thomas further urged: "failing adequately to consider basic principles of the constitutional structure as it relates

interests can be more compelling than a nation's need to ensure its own security." *Wayte v. U.S.*, 470 U.S. 598, 611, 105 S.Ct. 1524, 1533 (1985).

Petitioner's argument fails to overcome the judicially recognized deference to the political branches, in matters of war and foreign policy. He fails to show the "responses to international crises" were such that "the nature of which Congress" could "hardly have been expected to anticipate." *Dames & Moore*, 453 U.S. at 669. The United States is engaged in armed conflict with al Qaeda, an extensive terrorist organization. 66 Fed. Reg. 57,833, § 1(a). Congress anticipated the repeat violation of United States sovereign territory when it authorized the President to take "necessary and appropriate" steps "to prevent further acts of terror." 115 Stat. 224. "The 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.'" *Hamdi*, 542 U.S. at 518 (quoting *Quirin*, 317 U.S. 1, 28, 30 63 S.Ct. 2 (1942) (brackets in original)). Congress would "have been expected to anticipate" the "capture and detainment" of belligerents, like Ahmed. 453 U.S. 669; 542 U.S. at 518.

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to national security and foreign affairs" would be a critical affront to the very essence of the Constitution and the concept of separation of powers. *Hamdi*, 542 U. S. at 579 (2004) (Thomas, dissenting).

This Court previously acknowledged Presidential authority to hold "enemy combatants," interpreting the AUMF as Congressional authorization to use any "necessary and appropriate force" including the inherent presidential power to detain enemy combatants to "protect United States citizens both at home and abroad" against "future acts of international terrorism." 542 U.S. at 518. *Hamdi's* constructional interpretation of the AUMF recognizes Presidential authority to detain all enemy combatants. *Cf. Id* at 516-20.

The President is responsible to protect the people and territory of the United States "in either actual, or threatened, time of war, from danger caused by the presence of those persons therein described and the power of Congress to meet the danger in the ways chosen is plain." *U.S. ex rel. Von Heymann v. Watkins*, 159 F.2d 650, 653 (C.A.2 1947) (citing *De Lacey v. United States*, 9 Cir., 249 F. 625, L.R.A. 1918E, 1011)).<sup>4</sup>

Enemy combatant classification and detention applies only to those who pose a real danger to the United States. See *Ex parte Mitsuye Endo*, 323 U.S. 283, 302, 65 S.Ct. 208, 218 (1944).

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<sup>4</sup> Justice Thomas' dissent in *Hamdi* embodies these points, when the Executive Branch, "acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval" designates an individual, such as Ahmed, for detention as "an enemy combatant," that decision "falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision." *Hamdi*, 542 U. S. at 579 (2004) (Thomas, dissenting).

"He who is loyal is by definition not a spy or a saboteur" or enemy combatant. *Id.* "[T]he power to detain is derived from the power to protect the war effort." *Id.* AUMF detentions have the requisite "relationship to that objective." *Id.* Documentation by intelligence agencies show Ahmed poses grave danger to the security of the United States.

Those who "associate themselves with the military arm of the enemy," receive "its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of (...) the law of war." *Ex parte Quirin*, 317 U.S. 1, 37-38, 63 S.Ct. 2, 15 (1942) (citing *Cf. Gates v. Goodloe*, 101 U.S. 612, 615, 617, 618, 25 L.Ed. 895 (1879)). Ahmed allied himself with al Qaeda, received funding, training, and traveled to the United States on orders to facilitate terrorist attacks from within. (See Appendix A, Murphy Declaration). The President determined Ahmed is an enemy combatant and poses a clear and present danger to the United States. (See Appendix A, Executive Order; Murphy Declaration). Ahmed, an al Qaeda operative, entered the United States under false pretenses to cause injury and destruction. *Id.* The AUMF and the President's constitutional authority, authorizes the detention of an enemy combatant like Ahmed. See *Hamdi*, 542 U.S. at 518.

Ahmed's detainment is necessary to prevent future attacks. (See Appendix A, Executive Order). Presidential authority

"begins when war" or armed conflict "is declared but is not exhausted when the shooting stops." *Ludecke v. Watkins*, 335 U.S. 160, 167, 68 S.Ct. 1429, 1433 (1948) (citing, e.g., *United States v. Anderson*, 9 Wall. 56 70, 19 L.Ed. 615 (1869)). "Nor does law lag behind common sense." *Ludecke*, 335 U.S. at 166-7. "[E]nemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come." *Id.* at 171.

The *Alien Enemy Act*, conveys expansive Presidential detention authority when "any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States." 50 U.S.C. §§ 21-24 (1798). These broad powers include: (1) restriction, (2) detention, and (3) deportation of aliens. *Id.* Aliens "within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies." *Id.* at § 21. "[T]he power to remove" and detain enemy aliens is "vested in the president," because "he might deem that measure most effectual to guard the public safety." *U.S. ex rel. Von Heymann*, 159 F.2d at 653 (quoting *Lockington v. Smith*, 15 F.Cas. 758, No. 8448 (C.C.Pa. 1817)) (internal quotations omitted). Noncombatant enemy aliens are also subject to presidential authority and can

"be apprehended, restrained, secured, and removed as alien enemies." *Alien Enemy Act*, 50 U.S.C. § 21. A "resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists." *Johnson v. Eisentrager*, 339 U.S. 763, 775, 70 S.Ct. 936, 942 (1950) (citing e.g., *Ludecke v. Watkins*, 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 1881). "The President had summary power under the Act," even without an active war. 335 U.S. at 166.

This Court should hold that criminal statutes, like the Patriot Act, are not binding on the AUMF. Acts and statutes are distinguishable as either criminal or as under the War powers based on their direction, intent and scope. Federal criminal statutes are under Congress' plenary power to enact. See U.S. Const. Art. I, §§ 1,8. War Powers resolutions such as the AUMF fall within the dual purview of Congress and the President. U.S. Const. Art. See 1, § 8, cl. 11; U.S. Const. Art. II, § 2 cl. 1. Detention is governed by civilian procedure when "no questions of military law are involved." *Endo*, 323 U.S. at 298. This Court bifurcated jurisdiction by a "civilian agency," under criminal laws and "the military," under "the laws of war." *Id.* at 297. War powers methodology will not be applied to criminal detainment, but is applied to military questions, "such as was presented in *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281, or in *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3." *Id.* at

297.

This Court declined to apply war powers methodology to a criminal issue "Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military." 323 U.S. at 298. Ahmed's detention is by the military and as a result of his connection to September 11<sup>th</sup> and al-Qaeda. Ahmed's detention is authorized under the war power granted the President under Article II and Congress under Article I. See U.S. Const. Art. 1, § 8, cl. 11; U.S. Const. Art. II, § 2 cl. 1. If it was the legislative and executive intent to prosecute enemy combatants only by way of criminal methodologies Congress would have expressly stated that intention in the AUMF to limit the Presidents war power.

When analyzing legislative intent, this Court should find that Criminal statutes, like the Patriot Act, do not limit or subvert the AUMF. Congress contemporaneously enacted the Patriot Act and the AUMF to address different exercises of Executive power. *Compare* 115 Stat. 224, and *United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 ("Patriot Act"). The AUMF speaks to Executive power under an exercise of the War powers authority, while the Patriot Act speaks only to criminal power. *Compare Id. and Id.* This critical distinction between the Patriot Act and the AUMF exists to

separate criminals from the belligerents in a conflict and protect the later against unfair treatment.

The Patriot Act empowers the Attorney General to detain persons based on criminal action as relates to national security. See 115 Stat. 272. The Patriot Act applies only to those aliens charged with criminal offenses. See 115 Stat. 272.. The Patriot Act is one that deals with national security issues but it does so in the criminal courts. See 115 Stat. 272. The AUMF provides a clear statement by Congress that authorizes the military detention of individuals, during the conflict, who were either members of the armed forces of a hostile group or otherwise acted to harm the United States. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008).

The Constitutional protections applicable to criminal defendants do not apply to Ahmed. The question of whether detention is constitutional has already been decided by this Court. See generally *Ex Parte Quirin*, 317 U.S. 1 In *Ex Parte Quirin*, this Court negated these same claims, stating that the Fifth Amendment: "cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts." 317 U.S. at 17. Enemies who enter the United States "secretly," subject themselves to detention as an enemy combatant. *Id.* In *Quirin*,

several unlawful combatants entered the United States without uniform and without any declaration of their intentions. See *Id.* Ahmed entered the United States covertly.

Presidential authority to detain enemy combatants is essential, especially those who invaded our sovereign territory through deception. "The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security." *Boumediene*, 128 S.Ct. at 2276. Presidential authority to detain enemy combatants has been upheld by this Court each time it has arisen.

**II. The process afforded by the district court to challenge a designation as an "enemy combatant" is sufficient under the requirements of the Fifth Amendment.**

A. The due process required for aliens subject to military detention, like Ahmed, is less than citizens and civilians.

When determining the level of due process afforded to an alien detainee, like Ahmed, this Court should analyze Constitutional rights upon a sliding scale with levels of protections dependant on the detainee's legal status. "[E]ven by the most magnanimous view, our law does not abolish inherent distinctions [...] between citizens and aliens." *Johnson v. Eisentrager*, 339 U.S. 763, 769, 70 S.Ct. 936, 94 L.Ed. 1255 (1950).<sup>5</sup> Constitutional freedoms are analyzed upon an "ascending

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<sup>5</sup> Justice Jackson emphasized the distinction between citizens and aliens as one which "was laid down in the very earliest days of

scale of rights as [an alien] increases his identity with our society." *Id.* at 770. The government's report shows Ahmed does not intend to identify with our society or conform to our laws. (See Appendix A, Murphy Declaration). Ahmed "represents a continuing, present, and grave danger to the national security of the United States." (See Appendix A, Executive Order).

Due process "protection may vary depending upon status and circumstance." *Zadvydas v. Davis*, 533 U.S. 678, 694, 121 S.Ct. 2491, 2501 (2001); citing *e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S.Ct. 321, 74 L.Ed.2d.21 (1982). Lowered protection derives from "political and legal relations to the enemy." *Johnson*, 339 U.S. at 773. Credible intelligence information shows Ahmed maintains extensive ties to a designated terrorist organization, including receipt of funding and training to operate as a sleeper agent. (See Appendix A, Murphy Declaration). The Magistrate Judge was correct in distinguishing Ahmed's due process from civilian procedure.

Citizen due process requires: "notice of the factual basis for his classification, and a fair opportunity to rebut the

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the Republic and has endured to his day." He stressed this concept was ripe in the minds of the Founding Fathers in reference to the Alien Enemy Act of 1798. While the detainment and deportation under Alien Enemy Act, like the detention before the Court today, "obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders." *Johnson*, 339 U.S. at 773-774.

Government's factual assertions before a neutral decision maker." *Hamdi*, 542 U.S. at 533 (citing e.g., *Cleveland Bd. Of Ed. V. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)). Despite legal status distinctions, the Magistrate Judge followed the process for citizens in *Hamdi*. Ahmed was awarded citizen protections in excess of what he is entitled to as an enemy alien.<sup>6</sup>

B. War creates the exigent circumstances necessary for detention prior to due process notice and hearing.

Exigent circumstances make post-detention due process appropriate when classifying enemy combatants.<sup>7</sup> "Due process is not denied when postponement of notice and hearing is necessary to protect the public [...] or the war effort. *Calero-Toledo v.*

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<sup>6</sup> The four dissenting Justices in *Boumediene*, stress that when the *Hamdi* due process requirements are met alien "[d]etainees will have received all the process the Constitution could possibly require," as "surely the Due Process Clause does not afford non-citizens in such circumstances greater protection than citizens are due." *Boumediene*, 128 S.Ct. at 2280 (Roberts, Scalia, Thomas, and Alito, dissenting) (emphasis in original).

<sup>7</sup> The same men who enshrined the concept of due process into our Constitution also understood that national security is paramount. In Federalist No. 23, Alexander Hamilton explained that war power "ought to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances."

*Pearson Yacht Leasing Co.*, 416 U.S. 663, 679, 94 S.Ct. 2080, 2089 (1974) (citing *United States v. Pfitsch*, 256 U.S. 547, 41 S.Ct. 569 (1921)). Postponement is justified when: detention “serves significant governmental purposes;” advance “notice and hearing might frustrate the interests” of the government; and, there “has been a government official responsible for determining” necessity. *Id.* at 678-679. Detention achieves the government’s goal to “deter and prevent acts of international terrorism.” 115 Stat. 224. This interest will be frustrated if a terrorist is granted time to execute attacks. Executive order determines detention is “necessary to prevent “an alien” from aiding al Qaeda.” (See Appendix A, Executive Order).

The Appellate Court referenced *Salerno* explaining detention prior to trial must fit within a “carefully limited exception.” *U. S. v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 2105 (1987). Chief Justice Renquist explained in *Salerno* that “in times of war or insurrection” and “[e]ven outside the exigencies of war,” this Court finds “sufficiently compelling government interests can justify detention of dangerous persons.” *Id.* at 748. “It is ‘obvious and unarguable’ no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307, 101 S.Ct. 2766, 2782 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509, 84 S.Ct. 1659, 1665(1964)). Enemy combatant classification means a person is

"danger to the national security of the United States." (See Appendix A, Executive Order).

C. The process afforded by the Magistrate Judge comports with the requisite due process for aliens detained by the military.

1. The government's interest in national security prevails over Ahmed's private interest under appropriate Due Process balancing tests.

The *Mathews* balancing test determines what protections satisfy due process requirements. See e.g., *Hamdi*, 542 U.S. at 529. The three *Mathews* prongs are applied "by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 96 S.Ct. 893 (1976)). However, this Court interpreted *Ex parte Milligan* to explain "tests and limitations to be applied may differ because of the military context" of a case. *Rostker v. Goldber*, 453 U.S. 57, 67, 101 S.Ct. 2646, 2653 (1981). The "military context" of enemy combatant classification impedes due process protections. *Id.*

When weighing Ahmed's interest against the government's duty to the people, this Court should find the balance sways for the government.<sup>8</sup> The Petitioner, an alien, aligned with al Qaeda,

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<sup>8</sup> The government's interest in the successful exercise of its war powers and foreign relations responsibilities is documented from

materially connected to the September 11<sup>th</sup> attacks, attempts to argue his personal interest outweighs protecting the United States from the type of attacks his organization executes. See Appendix A, Murphy Declaration; 114 Stat. 224. Yet, this Court believes “[f]ew interests can be more compelling than a nation's need to ensure its own security” because “[u]nless a society has the capability and the will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning.” *Wayte v. U.S.*, 470 U.S. at 611-12. Individual liberty interests may be subordinated to the compelling interest in national safety. See *U.S. v. Salerno*, 481 U.S. at 750.

When analyzing the procedures which effectuate the governmental interest, this Court should find the government's intelligence reports mitigate the risk of erroneous deprivation of an enemy combatant's personal liberty. Erroneous deprivation is less likely when the rationale behind deprivation comes from reliable reports. See *Mathews v. Eldridge*, 424 U.S. at 344-345. “[S]ubstantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration.” *Mathews v. Eldridge*, 424 U.S. at 349. The AUMF charges the

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the birth of this nation, as James Madison emphasized in Federalist No. 41, “[s]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union.”

Executive with the enemy combatant classification process. See 115. Stat. 224. If this Court is to confer trust upon the determinations made by social welfare agencies like in *Mathews*, it is logical to be uniform in application and extend the same respect to the determinations made by the President and counterterrorism agencies. *Cf.* 424 U.S. at 349.

2. National security is unduly burdened by an additional notice requirement.

Sufficiency of notice "does not require heroic efforts by the Government." *Dusenbery v. U.S.*, 534 U.S. 161, 171, 122 S.Ct. 694, 701 (2002). The President outlined five specific reasons to detain Ahmed. (See Appendix A, Executive Order). Classified intelligence provided the factual basis for the President's determinations. Appendix A, Murphy Declaration. Forced disclosure of classified information "ignores the realities of intelligence work." *C.I.A. v. Sims*, 471 U.S. 159, 176, 105 S.Ct. 1881, 1891 (1985). "Bits and pieces of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.'" *Id.* at 178. (quoting *Halperin v. CIA*, 203 U.S.App.D.C. 110, 116, 629 F.2d 144, 150 (1980). "[W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.'" *Id.* (citing *Halkin v. Helms*, 184 U.S.App.D.C.

82, 90, 598 F.2d 1, 9 (1978)). Sanitizing reports to remove classified information, methods of gathering intelligence, and confidential sources, transfers the act of notice into the realm of heroic efforts.

The detriment to national security which could flow from disclosing additional information to an enemy combatant is inconceivable. It is an undue burden to require the government to provide additional protections to enemy combatants; inherent in detailed disclosure for due process is the risk the United States will jeopardize the intelligence resources needed to prevent terrorist activities. See *Hamdi*, 542 U.S. at 595, (Thomas, dissenting); *Boumediene*, 128 S.Ct. at 2288 (Roberts, Scalia, Thomas, and Alito, dissenting). Analysis of the government's burden in disclosing intelligence "require[s] complex political, historical, and psychological judgments." *Sims*, 471 U.S. at 176 (citing e.g., *Fitzgibbon v. CIA*, 578 F.Supp. 704 (DC 1983)). The responsibility is "not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Id* at 180. A grave threat exists the nation will be ill prepared to "prevent any future attack," causing a repeat of the September 11<sup>th</sup> tragedies if "necessary and

appropriate" information does not remain classified. 115 Stat.

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3. A full adversarial hearing is not required to challenge enemy combatant designation.

*Mathews* requires the hearing be "tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard." *Mathews*, 424 U.S. at 349 (quoting *Goldberg v. Kelly*, 397 U.S., at 268-269, 90 S.Ct., at 1021 (1970)). Evidentiary hearings were designed for a petitioner "to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 1940 (2007). Mismanagement of judicial resources is implicit in providing a hearing in excess "of the decision to be made." *Mathews*, 424 U.S. at 349. The rigors and heightened procedures necessary for justice in a full adversarial trial are not "tailored" to the "capacities and circumstances" of a Petitioner if the Petitioner cannot show even preliminary rebuttal evidence. *Id.*

Habeas corpus and substitute proceedings draw their processes from a variety of sources, "fashion[ing] appropriate modes of procedure, by analogy" and drawing from "civil or criminal rules or elsewhere in the usages and principles of

law.'" *Harris v. Nelson*, 394 U.S. 286, 299, 300, 89 S.Ct. 1082, 1090, 1091 (1969).<sup>9</sup>

This court should find presenting rebuttal evidence is not synonymous with proving innocence. It is not necessary for habeas corpus and its substitute proceedings to resemble a criminal trial. See *Boumediene*, 128 S.Ct. at 2269. The government is not obligated to meet a reasonable doubt standard. *Id.* The burden shifting scheme is a more appropriate standard. See *Hamdi*, 542 U.S. at 534.

Ahmed's burden is to show sufficiently specific facts why he is entitled to relief. Habeas corpus is denied when "various allegations are supported by nothing other than [the petitioner's] own conclusory statements that they are true." *In re Vey*, 520 U.S. 303, 117 S.Ct. 1294 (1997). It has long been held "general allegations" of detainment "in violation of the

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<sup>9</sup> Drawing from the "usages and principles of law," the enemy combatant classification process can be likened to a grand jury, further meeting Fifth Amendment requirements. *Harris v. Nelson*, 394 U.S. at 300. A grand jury is empanelled to "investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *U.S. v. Williams*, 504 U.S. 36, 48, 112 S.Ct. 1735, 1742 (1992) (quoting *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297, 111 S.Ct. 722, 726, 112 L.Ed.2d 795 (1991)). Then the grand jury determines if reasons exist to move towards a full hearing. See *Williams*, 504 U.S. at 51. The process determined by the magistrate judge is an investigation into the government's suspicions that Ahmed violated the laws of war. The determination of Ahmed's status as an enemy combatant creates the grounds upon which the government can move forward.

constitution and laws of the United States,” and “without due process of law, are averments of mere conclusions of law, and not of matters of fact. *Whitten v. Tomlinson*, 160 U.S. 231, 242, 16 S.Ct. 297, 302 (1895). It is reasonable to presume if Ahmed cannot provide credible evidence to rebut enemy combatant classification, then his allegations are too vague to be presented to a court.

Ahmed does not require more than 60 days to rebut the government’s evidence. The encumbrance placed upon courts and government officials which is “necessarily and properly incident to the processing and adjudication of habeas corpus proceedings, would be vastly increased” if the evidentiary process is not tightly managed. *Harris*, 394 U.S. at 297. However, there is also an important grievance with the detained. See *Id.* If the time frame for gathering and preparing rebuttal evidence is extended, there would be an additional delay in the finite classification of the detainee. See *Id.* Limitation to 60 days ensures efficiency and allows for a speedy release if a petitioner can rebut classification.

Automatic exclusion of out of court statements is nonessential as Ahmed, like any party in a suit, simply must present more persuasive evidence than his adversary. *Under Hamdi’s* heightened citizen standard, the government needs to produce “credible evidence,” and it is recognized documents like

the Murphy Declaration “may need to be accepted as the most reliable available evidence.” 542 U.S. at 534. The use of out of court statements benefits both parties. Ahmed is not barred from presenting his own hearsay evidence, which may be the only evidence attainable. Utilizing this evidence standard transforms the issue from one of admissibility to one of weight.<sup>10</sup>

As the factual history of the “enemy combatant” determination, this Court should find Executive records and evidence are presumptively credible. This presumption does not offend Constitutional provisions. See 542 U.S. at 534. The factual record of lower courts is presumptively correct in federal habeas corpus proceedings. See *Miller-El v. Cockrell*, 537 U.S. 322, 358, 123 S.Ct. 1029, 1051 (2003). “[T]o ‘presume’ facts ‘correct’ means a court cannot allow a habeas applicant” to “[attack] the process employed” by the “*factfinder* rather than the actual *factfindings*.” *Id.* (emphasis in original). A presumption in favor of the executive record remains a rebuttable one. Respecting the methods used to compile reports

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<sup>10</sup> The analogy to grand jury proceedings provides further reasoning for the admission of out of court statements like the Murphy Declaration. This Court has repeatedly “declined to enforce the hearsay rule in grand jury proceedings.” *Williams*, 504 U.S. at 50 (quoting *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956)). Hearsay does not invalidate an indictment, nor stop the government from being able to proceed to the next stage in adjudication. See *Williams*, 504 U.S. at 54. The use of Murphy Declaration does not discredit the enemy combatant process.

and providing the executive records deserving weight, does not prevent Petitioner from producing his own credible evidence when rebutting his enemy combatant status.

**Conclusion**

For the foregoing reasons, this Court should find that the AUMF Constitutionally authorizes, the military detention of enemy alien combatants, lawfully residing in the United States, without criminal charge or trial. Additionally, that an enemy alien is entitled to less due process rights under the Fifth Amendment than are citizens or civilians.

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Team 4777  
666 Any St.  
Any City, AA 66666  
(666) 666-6666  
Attorneys for Respondent

## Appendix A

### Declaration of John R. Murphy

Director, Joint Intelligence Task Force for Combating Terrorism

1. I, John R. Murphy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

#### Preamble

2. I submit this Declaration for the Court's consideration in the matter of Ahmed v. United States, pending in the United States District Court for the District of East Dakota.

3. Based on the information that I have acquired in the course of my official duties, I am familiar with all the matters discussed in this Declaration, and all of the information regarding Burhan Uddin Ahmed gathered by the Federal Bureau of Investigation (FBI) and by personnel of the Department of Defense (DoD) once the DoD took custody of Ahmed after he was declared an enemy combatant by the President of the United States.

#### Declaration of Ahmed as an Enemy Combatant

4. The President of the United States declared Ahmed an enemy combatant on June 13, 2003. The President made this determination based on intelligence gathered and analyzed through the cooperation of several Executive Branch agencies.

#### Ahmed's Background and Training

5. Ahmed is a Pakistani citizen.

6. Ahmed attended an al Qaeda-run terrorist training camp in Afghanistan for 18 months between 1996 and 1998. He was trained in the use of poisons.

7. In Afghanistan, Ahmed cultivated relationships with senior al Qaeda leaders, including Osama Bin Laden and Khalid Sheikh Muhammad.

8. Ahmed legally entered the United States with his family on September 8, 2001. He was ostensibly in the United States to pursue a doctorate in veterinary medicine at Wilson University in Wilson, East Dakota. When he was arrested by the FBI in January 2002, he was in failing status at the university due to his consistent absenteeism.

#### Ahmed's al Qaeda Activities

9. Ahmed was commissioned by al Qaeda to enter the United States as a sleeper agent. While in Afghanistan Ahmed met personally with Osama Bin Laden. Ahmed volunteered to be an al Qaeda martyr or to do whatever else was asked of him. He was sent to the United States to establish cover as a sleeper agent.

10. In the United States, Ahmed received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator of 9/11.

11. Ahmed acted as a contact point for al Qaeda operatives newly arriving in the United States. In addition, Ahmed was instructed to investigate the plausibility of hacking into the main-frame computer systems of the Social Security Administration with the objectives of creating chaos in the United States's social safety net and securing revenue for future terrorist attacks through Social Security fraud.

#### Analysis of Laptop Computer

12. The FBI conducted a forensic examination of Ahmed's laptop computer. The investigation revealed that Ahmed was conducting research regarding use of chemicals as weapons of mass destruction.

13. The highly technical information found on Ahmed's laptop far exceed the interest of a merely curious individual, and rather is consistent with the documented interests of al Qaeda and other terrorist groups.

14. Ahmed's laptop also contained several computer programs typically utilized by computer hackers, and bookmarked websites devoted to computer hacking.

15. In addition, the laptop analysis revealed computer files containing Arabic lectures by Bin Laden and his associates on the importance of jihad and martyrdom, and the merits of the Taliban regime in Afghanistan.

#### Telephone Communications

16. After September 11, 2001, calling cards and cellular phone accounts attributed to Ahmed were used to attempt to contact a high-ranking al Qaeda officer known to be residing in the United Arab Emirates. Calls to the same number were made by several pay phones in the Wilson, East Dakota, area.

#### Social Security Card Theft

17. In Ahmed's laptop carrying case, a handwritten list of Social Security numbers and the names of their holders. All of the approximately 40 cards were issued to persons other than Ahmed.

18. During the forensic examination of Ahmed's computer, evidence of efforts to sell Social Security numbers was discovered.

#### Conclusion

19. In conclusion, this joint investigation has turned up sufficient evidence to determine that Ahmed was an active al Qaeda agent at the time he entered the United States. After entering the country, he engaged in conduct in preparation for acts of international terrorism intended to cause injury to the United States. Ahmed's status has been carefully and thoroughly reviewed, and it has been determined that Ahmed represents a continuing grave threat to the United States. Ahmed must be detained to prevent him from aiding al Qaeda in its efforts to attack and harm the United States.

JOHN R. MURPHY

Director, Joint Intelligence Task Force for Combating Terrorism  
Executed on 15 August 2004 in Washington, D.C.

#### Executive Order

As stated by United States Court of Appeals  
for the Twelfth Circuit

The Executive order stated it was "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) possess 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," and detention is "necessary to prevent him for aiding al Qaeda."

**Certificate of Service**

The undersigned certifies that, on January 12, 2009, a true and correct copy of the foregoing Brief for Respondent, The United States, was forwarded to the following counsel of record via certified mail:

American Constitution Society for Law and Policy  
1333 H Street, N.W. 11<sup>th</sup> Floor  
Washington, D.C. 20005

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Team 4777  
666 Any St.  
Any City, AA 66666  
(666) 666-6666  
Attorneys for Respondent