

No. 08-11144

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IN THE  
*Supreme Court of the United States*

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Burhan Uddin Ahmed,  
Petitioner,

v.

United States Of America,  
Respondent.

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

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**BRIEF FOR RESPONDENT**

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Counsel of Record, Team 4785

## Questions Presented

1. Does the President of the United States have authority under the Authorization for the Use of Military Force (AUMF) to indefinitely detain an alien enemy combatant where that alien is working as a sleeper cell for al Qaeda, has received terrorist training and funding, and is subsequently residing in the U.S. with the intent to harm America and its citizens?
2. Was Ahmed, an alien enemy combatant, afforded the process he was due to challenge his status under the Fifth Amendment by the District Court where the court reviewed the declaration presented by the government, determined it to be sufficient evidence against Ahmed, and where it was determined that Ahmed then was due notice of the factual assertions against him and a meaningful opportunity to rebut them before an a neutral arbitrator?

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### Opinions And Orders Entered In The Case

The petition for writ of cert to the United States Supreme Court is reported at Ahmed v. United States, No. 08-11144 (Oct. 2, 2009). The en banc opinion of the United States Court of Appeals Twelfth Circuit is reported at Ahmed v. United States, No. No. 06-9701 (12th Cir. 2008) (en banc). The opinion of the District Court of East Dakota is reported at Ahmed v. United States, No. XX-XXXX (D.E.D. 200X). The opinion and order of the magistrate judge is not reported.

### Jurisdictional Statement

The district court had jurisdiction over this civil habeas corpus proceeding pursuant to 28 U.S.C. § 2241. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(b). The judgment of the en banc court of appeals was entered on November 24, 2008. This Court granted petitioner's petition for certiorari on October 2, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### Constitutional And Statutory Provisions Involved In Case

#### **U.S. Const. art. II § 2 cl. 2:**

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states,

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

**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 offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001):**

Joint Resolution

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

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

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

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

Whereas, such acts continue to pose an unusual and extraordinary

threat to the national security and foreign policy of the United States; and

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

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

Section 1. Short Title.

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

Section 2. Authorization for Use of the United States Armed Forces.

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

(b) War Powers Resolution Requirements.

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

(2) Applicability of Other Requirements. Nothing in this resolution supersedes any requirement of the War Powers Resolution.

**Patriot Act § 412(a) "MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW."**

(a) IN GENERAL- The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after section 236 the

following:

SEC. 236A. (a) DETENTION OF TERRORIST ALIENS-

(1) CUSTODY- The Attorney General shall take into custody any alien who is certified under paragraph (3).

(2) RELEASE- Except as provided in paragraphs (5) and (6), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (6), such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

(3) CERTIFICATION- The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien--

(A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(a)(4)(B); or

(B) is engaged in any other activity that endangers the national security of the United States.

(4) NONDELEGATION- The Attorney General may delegate the authority provided under paragraph (3) only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

(5) COMMENCEMENT OF PROCEEDINGS- The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

(6) LIMITATION ON INDEFINITE DETENTION- An alien detained solely

under paragraph (1) who has not been removed under section 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

(7) REVIEW OF CERTIFICATION- The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

#### **28 U.S.C. § 2241 "Power to grant writ"**

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

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

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

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

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

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

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

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

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

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

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

Statement of the Case

On January 3, 2002, Pakistan citizen Burhan Uddin Ahmed was arrested in Wilson, East Dakota, by federal agents as a material witness in the government's investigation of the 9/11 attacks. (R. at 7). Ahmed was charged with the possession of counterfeit Social Security cards with the intent to defraud and making a false statement to the FBI. (R. at 7). On June 13, 2003, the government filed a motion to dismiss the criminal charges based on an order the President of the United States signed that morning. (R. at 7). The Motion to Dismiss was granted and Ahmed was transferred to military custody where he has since been held as an enemy combatant. (R. at 7-8).

The President's order stated that he had determined that Ahmed is an enemy combatant closely associated with al Qaeda engaged in conduct that constituted hostile and war-like acts, possesses valuable intelligence, and represents a continuing, present, and grave danger to the national security of the United States. (R. at 7). The President further determined that Ahmed's detention by the military was necessary to prevent him from aiding al Qaeda. (R. at 7). He thus ordered the Attorney General to surrender Ahmed to the Secretary of Defense, and directed Ahmed's detainment as an enemy combatant. (R. at 7).

Following his transfer to the Army Regional Consolidated Detention Facility, Ahmed filed a petition for a writ of habeas corpus in the District of East Dakota under 28 U.S.C. section 2241. (R. at 8). The Government provided the District Court with a hearsay document, the Declaration of John R. Murphy, Director of the Joint Task Force for Combating Terrorism (The Murphy Declaration). (R. at 8). Murphy affirmed that he was familiar with all matters discussed in the declaration. (Murphy Decl. ¶ 3).

The Murphy Declaration detailed that between 1996 and 1998, Ahmed trained in al Qaeda-run terrorist training camps, specifically in the use of poisons. (Murphy Decl. ¶ 6). While in Afghanistan, Ahmed cultivated relationships with high-ranking al Qaeda terrorists and met personally with Osama Bin Laden. (Murphy Decl. ¶ 7,9). He vowed to be a martyr for the cause and do whatever was asked of him. (Murphy Decl. ¶ 9)

It further outlined that Ahmed was commissioned by al Qaeda to enter the United States as a sleeper cell. (Murphy Decl. ¶ 9). Ahmed legally entered the United States under the guise of pursuing a doctorate in veterinary medicine in Wilson, East Dakota, although when arrested he was failing out due to continued absenteeism. (Murphy Decl. ¶ 8).

While in the United States, Ahmed received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator

for the 9/11 attacks. (Murphy Decl. ¶ 10). Ahmed was a contact point for al Qaeda operatives newly arriving in the United States, and in addition was instructed to investigate the plausibility of hacking into the main-frame computer systems of the Social Security Administration to create chaos and secure revenue for future terrorist attacks through Social Security fraud. (Murphy Decl. ¶ 11).

The Declaration also outlined the forensic examination conducted on Ahmed's laptop. (Murphy Decl. ¶ 12). It revealed that Ahmed was researching the use of chemical weapons, which far surpassed the interest of a merely curious individual. (Murphy Decl. ¶ 12, 13). The Declaration affirmed that he had also bookmarked hacker websites, possessed several hacker computer programs, and owned Bin Laden lectures about the importance of jihad, martyrdom, and the Taliban in Afghanistan. (Murphy Decl. ¶ 14-15). Further, Ahmed possessed a list of social security numbers and names, none of which were issued to Ahmed. (Murphy Decl. ¶ 17). His computer showed evidence of an attempt to illegally sell the social security numbers. (Murphy Decl. ¶ 18). Lastly, the Declaration presented incriminating evidence of telephone communication with al Qaeda leaders. (Murphy Decl. ¶ 16).

After reviewing The Murphy Declaration, the District Court concluded that Ahmed was lawfully detained as an enemy combatant

and was entitled to challenge the factual basis of his detention. (R. at 9). The district court sent the case to a magistrate judge to determine the process that Ahmed must be afforded. (R. at 9).

The magistrate judge determined that the government must provide Ahmed with notice of the factual basis of his detention, and that if the government could produce credible evidence, the burden would shift to Ahmed to refute this designation with more persuasive evidence. (R. at 9).

The magistrate judge considered the Murphy Declaration, concluding that it provided Ahmed with adequate notice of the factual basis for his detention and was sufficient evidence to put the onus on Ahmed to produce more persuasive evidence. (R. at 9). The magistrate judge allowed Ahmed 60 days to refute the evidence. (R. at 9).

Ahmed responded with a general denial. (R. at 9). He asserted that he was not an enemy combatant, but refused to offer any evidence to refute the assertions. (R. at 9). The magistrate judge then recommended that his petition for a writ of habeas corpus be dismissed. (R. at 10). The district court agreed, and Ahmed's petition was dismissed. (R. at 10).

Ahmed appealed the district court's decision dismissing his habeas petition, and a panel of the 12th Circuit affirmed the district court's dismissal. (R. at 5). Upon Ahmed's Motion for

Rehearing, the Court voted to vacate the panel opinion and hear the case en banc. (R. at 5). The 12th Circuit held that the AUMF authorized the President to detain Ahmed. (R. at 6). It also held, however, that Ahmed was not afforded sufficient process to challenge his designation as an enemy combatant. (R. at 6). The 12th Circuit reversed the decision of the district court. (R. at 6). Ahmed petitioned the United States Supreme Court for a writ of certiorari, which was granted. (R. at 1).

#### Summary of the Argument

The Twelfth Circuit was correct in holding that the President could militarily detain Ahmed. Under the AUMF Congress gave the President discretion to do what is necessary and appropriate in apprehending and preventing future attacks by al Qaeda and other organizations and persons responsible for September 11, 2001. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, §2(a), (2001). Ahmed is an enemy combatant of the United States. He is an active member of al Qaeda who has close relationships with many high-ranking al Qaeda officials and has received terrorist training and funding from the organization. As an alien residing in the U.S. and acting under the guidance and control of al Qaeda, Ahmed poses a grave danger to national security and therefore the President can detain him as an enemy combatant.

Ahmed can be legally detained in accordance with the AUMF despite legally residing in the U.S. and never taking up arms on behalf of an enemy nation. Hamdi v. Rumsfeld, 542 U.S. 507 (2004). America is currently at war with al Qaeda, which is an organization rather than a nation state. This categorization does not minimize the threat to national security. Ahmed, although legally residing in this country, was a sleeper cell for al Qaeda. These types of terrorists do not use traditional weaponry, yet this does not make Ahmed any less of a combatant or threat to the United States.

In the interest of national security the President can indefinitely detain Ahmed for the duration of the present hostilities. Id. at 521. Ahmed still poses a threat to the U.S., and if released from custody would potentially continue to serve al Qaeda's terrorist objectives. The Patriot Act alone does not eliminate the President's authority to detain Ahmed. Id. at 516. The Patriot Act simply allows the Attorney General, acting on behalf of the President, to also seize and detain potential enemy combatants.

The Fifth Amendment requires that all persons deprived of liberty or property be given due process of law. U.S. Const. amend. V. Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time,

place, and circumstances. Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

The Murphy Declaration, like the declaration in Hamdi, was sufficient evidentiary support for Ahmed's classification as an enemy combatant. A habeas court in a case such as Hamdi's may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to refute the Government's return. Hamdi, 542 U.S. at 538.

The Mathews balancing test is generally used to determine the process due an individual. Id. at 529. A citizen-detainee must be given notice of the factual assertions and a meaningful opportunity to refute them before a neutral decision-maker. Id. at 533. Ahmed was afforded this same process.

As Ahmed is not an American citizen, his liberty interest is not the same as in Hamdi. Therefore, having been afforded the same process that a citizen-detainee would be entitled to, Ahmed was given more due process than required by the Constitution. Further, the presence of the Mathews balancing test alleviates the possibility of erroneous deprivation. Id. at 534.

## Argument

Currently, the United States finds itself engaged in a war against al Qaeda. Lead by Osama Bin Laden, al Qaeda is a terrorist group of Muslim extremists who have vowed to take any measure needed to take down the West. Their aim is nothing short of world domination through terrorist strategies.

Al Qaeda, however, is different from most previous wartime enemies in that its goals extend beyond attacking military targets. It attempts just as fervently to infiltrate target nations with sleeper cells in order to kill innocent civilians. This has created many questions about the detention of enemy combatants and the intelligence used to classify them.

### **I. The President Is Permitted To Detain Ahmed In Accordance With The Authority Congress Bestowed Upon Him Under The AUMF Because Ahmed Is An Enemy Combatant Whose Close Association With Al Qaeda Makes Him A Continuous Threat.**

The Twelfth Circuit was correct in determining that Ahmed can be militarily detained by the President of the United States in accordance with the authority bestowed upon him by the AUMF. The AUMF, a joint resolution passed with the approval of Congress, grants the President power to use all necessary and appropriate force against nations, organizations, or persons he determines planned, authorized, committed, or aided the

terrorist attacks of September 11, 2001 in order to prevent any future attacks. AUMF, 115 Stat. 224, §2(a), (2001).

Al Qaeda was responsible for planning and committing the terrorist attacks against the United States on September 11, 2001. Ahmed is an active al Qaeda agent, with terrorist training, who entered the United States with the intent to terrorize America and its citizens. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security. Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008). The AUMF is the substantial authority given by Congress, to the President, to apprehend and detain al Qaeda agents such as Ahmed from once again attacking the United States.

**A. Due To His Terrorist Motives And Association With Al Qaeda, Ahmed Qualifies As An Enemy Combatant Under The Laws Of War And Can Be Detained By The President Under The AUMF.**

Ahmed was correctly identified as an enemy combatant under the laws of war. Generally, the Constitution affords all persons detained by the government the right to be tried in a criminal proceeding and prohibits the government from subjecting individuals arrested inside the United States to military detention. Hamdi, 542 U.S. at 519. There are, however, designated exceptions to this Constitutional right. One such

exception is the indefinite detention of enemy combatants during military hostilities. Id. at 520.

America is currently engaged in military hostilities with al Qaeda, which classifies Ahmed as an enemy combatant. The definition of an enemy combatant is uncertain and, according to the plurality in Hamdi, should be determined on a case-by-case basis. Id. at 522. Since 2001, there have been numerous lower court decisions that have attempted to define enemy combatant. Although not authoritative, these definitions are persuasive.

It has been determined that the AUMF authorized the President to detain all those who qualify as enemy combatants within the meaning of the laws of war. Padilla v. Hanft, 423 F.3d 386, 392 (4th Cir. 2005). Under the laws of war, an enemy belligerent [combatant] includes those acting under the direction of the armed forces of the enemy, and who enter American territory in civilian dress with the hostile purpose of destroying property used or useful in prosecuting the war. Ex parte Quirin, 317 U.S. 1, 36-38 (1942) (holding that an American citizen who secretly entered the U.S. with the intent to blow up domestic war facilities on behalf of Nazi Germany qualified as an enemy combatant).

Similar to the defendant in Quirin, Ahmed entered America under false pretenses with the ulterior motive of harming the

United States and its citizens during a time of war. Ahmed entered the U.S. under the guise of attending veterinary school. In reality, he was working under the direction of al Qaeda as a sleeper agent bent on hacking into the U.S. Social Security system with the intent to cause chaos and secure revenue for future terrorist attacks. Therefore, under the laws of war Ahmed qualifies as an enemy combatant.

In recent years the government has created new procedures for prosecuting enemy combatants. In 2004, by military order, the government created tribunals called Combatant Status Review Tribunals (CSRT). Boumediene v. Bush, 583 F. Supp. 2d 133, 134 (D.D.C. 2008). These military tribunals have the sole responsibility of adjudicating whether or not an individual can be lawfully detained by the military as an enemy combatant. Id. According to CSRT, an enemy combatant is defined as an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. Hamdan v. Rumsfeld, 548 U.S. 557, 571 Fn.1 (2006). If Ahmed were to appear before a CSRT his close affiliation with al Qaeda as a terrorist sleeper agent would qualify him as an enemy combatant.

Ahmed is an enemy combatant of the United States. He is a member of a terrorist organization with which America has been

at war with for over nine years. He is the exact type of person Congress had in mind when it passed the AUMF. Congress gave the President the executive discretion to use whatever force was necessary to stop persons like Ahmed from attacking America. In this case the force necessary and appropriate was the military detention of Ahmed.

**1. The Fact That Ahmed Was Not Arrested On A Foreign Battlefield Is Irrelevant To The President's Determination That He Is An Enemy Combatant And Can Therefore Be Detained Under The AUMF.**

The detention of Ahmed is legally authorized under the AUMF, despite the fact that he was not apprehended in Afghanistan or another zone of combat. In Hamdi, enemy combatant was narrowly defined as an individual who was part of or supporting forces hostile to the U.S. or coalition partners in Afghanistan and who engaged in an armed conflict against the U.S. there. Hamdi, 542 U.S. at 516.

Ahmed argues that this narrow definition allows only the military detention of an individual who is supporting al Qaeda in Afghanistan, and he does not qualify since he was living and arrested in the United States. Ahmed, No. 06-9701 (2008). This argument is misplaced, however, as nowhere in its framing of the narrow question did the plurality in Hamdi ever mention the locus of capture as a pertinent factor. Padilla, 423 F.3d at

393. What is relevant is not the location of capture, but rather the possibility of the enemy combatant returning to the battlefield. Id. The detention of a combatant during a time of war is to prevent that individual from returning to the battlefield to further serve the enemy. In re Territo, 156 F.2d 142, 145 (9th Cir. 1946).

The detention of Ahmed was to prevent him from further serving al Qaeda and subsequently returning to the battlefield. Unlike previous wars, the zone of combat in the war on terror is worldwide, including the U.S. as it is a main target of attacks. Congress, in realizing the war had infiltrated the U.S. border, passed the AUMF in an attempt to prevent such attacks from recurring. Detaining Ahmed is appropriate given the circumstances of the current war on terror.

**2. The Fact That Ahmed Did Not Physically Take Up Arms With An Enemy Nation Is Immaterial To His Classification As An Enemy Combatant And Subsequent Military Detention.**

Ahmed was appropriately designated an enemy combatant by the President despite not physically taking up arms with al Qaeda. An American citizen may be properly designated an enemy combatant within the meaning of the laws of war if one associates themselves with the military arm of the enemy government, and with its aid guidance and direction enters this

country bent on hostile acts. Ex parte Quirin, 317 U.S. at 37-38.

Ahmed associated himself with the military arm of al Qaeda. While in Afghanistan, he was trained in the use of poisons, met personally with Osama Bin Laden, and volunteered to be an al Qaeda martyr. These voluntary acts demonstrate Ahmed's association with the military arm of a U.S. enemy. Given the military tactics used by al Qaeda, such as airline hijacking and suicide bombs, it is irrelevant that Ahmed never possessed a traditional weapon. His physical presence in this country, given his training and allegiance to al Qaeda must be considered taking up of arms, in light of al Qaeda tactics.

Ahmed's reliance on Ex parte Milligan, 71 U.S. 2 (1866), is misplaced as it is not compelling precedent. Ahmed claims that he too was apprehended on U.S. soil without taking up arms and, therefore, should also be considered a non-combatant not subject to military detention. Ahmed, No. 06-9701 (2008). There are some relevant distinctions between the present case and Milligan that refute this argument. Unlike the Civil war, where the U.S. was fighting itself, the war against al Qaeda is against a known enemy organization. Also, in the present case Congress has expressly authorized the use of force against the al Qaeda organization in the AUMF, whereas Congress never expressly

authorized the use of force against the Confederate party during the Civil War. Milligan, 71 U.S. at 6. In addition, hacking into and destroying the U.S. Social Security system would not require the use of a weapon. Ahmed's reliance on Milligan is not compelling and thus has no effect on his status as an enemy combatant.

**3. Ahmed's Status As A Legal Alien Residing In The U.S. Does Not Prohibit His Detention By The U.S. Military In Accordance With The AUMF.**

The fact that Ahmed was a legal alien residing in the United States does not prohibit his military detention. Simply because an enemy belligerent is a citizen does not relieve him from the consequences of a belligerency which is unlawful because it is in violation of the laws of war. Ex parte Quirin, 317 U.S. at 18. Thus, the fact that a detainee is a U.S. citizen does not preclude his detention for the duration of a relevant hostility. See, e.g., Hamdi, 542 U.S. 507; Padilla, 423 F.3d 386; Ex parte Quirin, 317 U.S. 1.

Unlike the aforementioned cases, Ahmed is only a legal alien residing in the U.S. and not an American citizen. Thus, if the President has the authority to detain citizens he also reasonably has the authority to detain resident aliens.

**B. The Fact That Al Qaeda Is Not A Nation State Does Not Negate The Use Of The AUMF By The President As Al Qaeda Is An Entity With Which The U.S. Is At War.**

The fact that al Qaeda is a terrorist organization and not a nation state does not prohibit the use of the AUMF by the President, nor does it prohibit the use of the laws of war in defining and detaining representatives of al Qaeda. There is no doubt that al Qaeda is an entity with which the United States is at war with. Padilla, 423 F.3d at 389. The laws of war therefore apply to al Qaeda in the same manner they would apply to any other nation at war with America.

It is irrelevant that al Qaeda has no geographic border and is not a globally recognized nation. Congress, in passing the AUMF, was aware of this reality and intended to confer upon the President the same authority to detain individuals fighting on behalf of enemy organizations that it conferred upon him with respect to enemy nations. Gherebi v. Obama, 609 F. Supp. 2d 43, (D.C. 2009). The AUMF expressly gives the President the authority to use all force necessary against organizations or persons he determined planned, authorized or aided the terrorist attacks of September 11, 2001. AUMF § 2(a) (2001). The force necessary under the laws of war includes detaining sleeper agents of organizations committing hostile acts on U.S. soil.

**C. The President's Ability To Detain Combatants For The Duration Of Hostilities Allows Him To Indefinitely Detain Ahmed Without Criminal Charge For The Duration Of The Conflict.**

The President may detain an al Qaeda enemy combatant, such as Ahmed, for the duration of the present conflict. A properly designated enemy combatant pursuant to legal authority of the President may be detained without charge or criminal proceeding for the duration of the relevant hostilities. Hamdi, 542 U.S. at 521. America is currently at war with al Qaeda and Ahmed has been properly designated an enemy combatant by the President. Detention is an exercise of the right to use force and is a fundamental incident of waging war. Id. at 519. Therefore, in the interest of security, the President has the authority to indefinitely detain Ahmed until the end of the conflict.

The decision to indefinitely detain Ahmed is also in accordance with the laws of war. The laws of war state that enemies who in their attempt to thwart or impede our military effort have violated the law of war and are subject to seizure and disciplinary measures. Ex parte Quirin, 317 U.S. at 28-29. By entering the U.S., under the direction and guidance of an enemy of war, to commit hostile acts, Ahmed qualifies under the laws of war as one who may be militarily seized and detained. Until he no longer poses a threat to the United States or the

war on terror is over, Ahmed can legally be indefinitely detained.

**D. The AUMF, Which Gives The President The Authority To Detain Ahmed, Is Consistent With The Constitution And Is Not Superseded By The Patriot Act.**

The Patriot Act does not intrude upon the President's congressional and inherent authority to detain Ahmed. Hamdi, 542 U.S. at 516. The President, acting as Commander and Chief, has certain inherent war powers. U.S. Const. art. 2 § 2 cl. 1. According to the preamble of the AUMF, one such inherent war power that is granted to the President by the Constitution is the ability to take action to deter and prevent acts of international terrorism against the United States. AUMF, preamble ln. 6.(2001). Detaining Ahmed, a sleeper agent for al Qaeda intent on conducting acts of terrorism on U.S. soil, is an attempt by the President to deter terrorism.

The Attorney General's ability to detain combatants under the Patriot Act places no limitations on the President's own ability as Commander and Chief to detain an enemy combatant during a time of war. The Patriot Act grants discretionary authority to the Attorney General not the President. Patriot Act § 412(a) ¶ 1-6, (2001). The Attorney General however, is an agent for the President, working on his behalf and under his authority. The Patriot Act simply allows another authoritative

figure to additionally, alongside the President, detain combatants who are at war with the United States. It does not eliminate the President's inherent and separate power as Commander-in-Chief to detain Ahmed.

**II. The Process Afforded Ahmed To Challenge His Designation As An Enemy Combatant Satisfies The Fifth Amendment As He Was Given Notice Of The Factual Assertions, And A Meaningful Opportunity To Refute The Assertions, Which Is More Process Than Is Due Under The Mathews Balancing Test.**

Although the topic of war and detention sparks much political debate, the individuals in the judiciary must not use this case as a means for making a political statement. All branches of the federal government are charged with protection of the Constitution and the American people. There exists no cognizable American value that will be upheld by placing the rights of alien enemy combatants who seek to kill American civilians over the protection and security of those citizens.

**A. Ahmed Was Afforded Process that Satisfies The Fifth Amendment As He Was Given Notice Of The Factual Assertions Used Against Him And A Fair Opportunity To Refute Them Before A Neutral Decision-Maker.**

The Fifth Amendment demands that no person be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Mathews, 424 U.S. at 333. Due process, unlike some legal rules, is not a technical conception with a fixed

content unrelated to time, place, and circumstances. Id. at 334. Due process is flexible and calls for such procedural protections as the particular situation demands. Id.

Identification of the specific dictates of due process generally requires consideration of the balance between three distinct factors. Id. at 334-335. They are: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and lastly, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 335.

Therefore, the Mathews balancing test was evoked in order to answer the question of what process is due a citizen-detainee classified as an enemy combatant. Hamdi, 542 US at 532. The Court ruled that due process requires that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to refute the government's factual assertions before a neutral decision-maker. Id. at 533.

The simple outline of 28 U.S.C. section 2241 makes clear that Congress intended that habeas petitioners have some

opportunity to present and refute facts, but also explains that the courts retain the flexibility to vary the ways in which they do so. Id. at 526. The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it. Id. All that is necessary is the the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case. Mathews, 424 U.S. at 349.

**1. The Murphy Declaration, Like The Mobbs Declaration In Hamdi, Is Sufficient Evidentiary Support Against Ahmed And Gave Him Adequate Notice Of The Factual Assertions Against Him.**

While constitutional promises may not be eroded, at the same time, the exigencies of the circumstances may demand that enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hamdi, 542 U.S. at 533. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Id. at 533-34.

Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttable was provided. Id. at 534.

In Hamdi, the government presented the Mobbs Declaration as the sole evidentiary support for the classification. A habeas court in a case such as Hamdi's may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to refute the Government's return. Id. at 538.

The declaration in Hamdi was from one Michael Mobbs, Special Advisor to the Undersecretary of Defense for Policy. He declared that in his position he was familiar with the situation surrounding the detention of Hamdi. The declaration outlined that Hamdi, an American citizen, went to Afghanistan, received weapons training with al Qaeda, and was detained when his unit, fighting against American forces, surrendered.

Like in Hamdi, the government used a declaration that sufficiently outlined the case against Ahmed. In the present case, the government produced The Murphy Declaration as evidentiary support that Ahmed was an enemy combatant. The Declaration is one of John R. Murphy, Director of the Joint Intelligence Task Force For Combating Terrorism. It outlined how Ahmed spent eighteen months in al Qaeda-run terrorist training camps in Afghanistan, was trained in the use of poisons, and vowed to support al Qaeda as a martyr for the cause. A declaration of a lower ranking official with similar information

was found to be sufficient evidentiary support in Hamdi.

Therefore, the government has produced sufficient evidentiary support in support of Ahmed's enemy combatant status with the Murphy Declaration.

- a. The Murphy Declaration Is Sufficient Evidentiary Support And Notice To Ahmed As It Provided Far More Information Than The Mobbs Declaration In Hamdi.

In addition, the Murphy Declaration declared far more than the Mobbs Declaration, further enhancing its sufficiency. The Murphy Declaration confirmed Ahmed's personal relationships with al Qaeda leader Osama Bin Laden and that he was sent to the United States as a sleeper cell under the guise of attending veterinary school, but never attended.

The Murphy Declaration further outlined that while in the U.S. Ahmed received substantial financial funding from al-Hawsawi, the financial facilitator of 9/11. Ahmed was also the point of contact for al-Qaeda operatives newly in the U.S., and was instructed to investigate the plausibility of hijacking computer mainframes of the Social Security Administration. Further, it outlined an analysis of incriminating evidence found on Ahmed's personal laptop, incriminating phone communications, and evidence of social security theft. As the Mobbs Declaration used in Hamdi was sufficient, the Murphy Declaration is more than sufficient as it contains far more evidence and assertions.

2. Ahmed Was Given A Meaningful Opportunity To Be Heard And Refute The Government's Charges Before A Neutral Decision-Maker, Yet Chose Not To.

An enemy combatant must also be given a meaningful opportunity to refute the government's charges before a neutral decision-maker. Hamdi, 542 U.S. at 533. The Constitution, however, would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and a fair opportunity to be heard was provided. Id. at 534.

Ahmed was given a meaningful opportunity to refute the government's factual assertions against him. He was given sixty days to refute the evidentiary support offered by the government. Instead of taking the opportunity, Ahmed did not refute one piece of evidentiary support offered by the government. Ahmed's silence and lack of effort does not create a violation of the due process clause. All that is necessary is the the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case. Mathews, 424 U.S. at 349. Ahmed was afforded the process he was due.

The Court has recognized scenarios where the process afforded would violate the Constitution, yet they are not

present in the case against Ahmed. Any process in which the Executive's factual assertions go wholly unchallenged [without any court interference] or are simply presumed correct without any opportunity for the detainee to refute falls constitutionally short. Hamdi, 542 U.S. at 537. That was certainly not the case here. Ahmed was given a meaningful chance to refute the facts, as he had sixty days to refute the factual assertions presented by the government. Regardless of whether he took that opportunity, Ahmed was afforded the process that he was due.

3. The Government Need Not Prove That The Evidentiary Support Offered Is The Most Reliable Evidence Available, As Nothing In Hamdi Requires The Government To Satisfy That Burden.

The Twelfth Circuit misinterpreted the Hamdi case by requiring that the government prove that the evidence offered is the most reliable available. Ahmed v. United States, No. 06-9701 (12th Cir. 2008). As proof of the alleged requirement, the Court referred to a statement in Hamdi that hearsay may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Id., *citing Hamdi*, 542 U.S. at 534. The Twelfth Circuit, however, misinterpreted this statement.

The language referred to in Hamdi does not create an extra burden of proof on the government, rather, it informs the courts

that they may have to accept hearsay and other like documents as the most reliable evidence available. A court may even presume the government's evidentiary support to be true, so long as the detainee receives an opportunity to refute the facts. Hamdi, 542 U.S. at 534. Hamdi informs the courts that there will be situations, such as with enemy combatants, where they will have to assume the reliability of the factual assertions. There is no additional proof burden placed on the government by this language. Therefore, the Twelfth Circuit has misinterpreted the requirements laid out in Hamdi.

The most reliable evidence in any similar case would likely be from the military or intelligence officers that gathered the information. Nevertheless, uprooting military personnel from battle or removing an intelligence operative from his post would be a tremendous burden on the government. To be clear, additional or substitute procedural safeguards are unwarranted in light of their limited probable value and the burdens they may impose on the military in such cases. Hamdi, 542 U.S. at 532-33 (*citing* Mathews, 424 U.S. at 335).

The Hamdi decision was meant to instruct the courts that they shall not require the government to produce or prove that the evidence presented is the most reliable available. As the Court expressed, there is no reason to doubt that courts faced

with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties. Id. at 539. Therefore, due process does not require that the government prove its evidence is the most reliable available.

- B. Under The Mathews Balancing Test, Ahmed Is Due Less Procedural Process Than Given In Hamdi, And Therefore, Was Afforded More Due Process Than Required By The Constitution.

The Mathews balancing test is used to determine the process that one is due under the Constitution. Id. at 529.

Identification of the specific dictates of due process generally requires consideration of three distinct factors. Mathews, 424 U.S. at 334-35. They are: the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and lastly, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id.

**1. Ahmed's Private Interests Are Not The Same As Hamdi's As Ahmed, Unlike Hamdi, Is Not A Citizen Of The United States.**

The first interest to be considered when determining the process due an individual under the Mathews balancing test is the private interest that will be affected by the official action. Id. The Twelfth Circuit incorrectly asserted that Ahmed's private interests are exactly the same as those in Hamdi. Ahmed v. United States, No. 06-9701 (12th Cir. 2008). Hamdi's private interest affected by the official action is the most elemental of liberty interests-the interest in being free from physical detention by one's own government. Hamdi, 542 U.S. at 529. Ahmed does not have the same private liberty interest.

Ahmed is not a U.S. citizen, and therefore cannot possibly have the same substantial private interest affected in Hamdi. Being a citizen of Pakistan, Ahmed was not physically detained by his own government. Because Ahmed's interests are not as substantial as Hamdi's, the balancing test does not strike the same equilibrium as it did in Hamdi. In addition, substantial interests lie on the side of the government. Id. As such, it would be impossible for Ahmed to be due any more process than was afforded Hamdi, and quite likely that he is due less process as his liberty interest is not as fundamental as the citizen-detainee.

The magistrate judge erred on the side of giving Ahmed the most process possible, which is clearly not a violation of the Due Process Clause. As Ahmed has lesser private interests at stake than that in Hamdi, yet was given the same process, he was afforded more process than required by the Fifth Amendment.

2. The Risk of Erroneous Deprivation Is Avoided In Situations Such As Ahmed's, As The Opportunity To Refute the Factual Assertions Meets the Goal of Assuring There is Not An Error.

The second factor to be considered under the Mathews balancing test is the risk of an erroneous deprivation of such interest through the procedures used. Mathews, 424 U.S. at 335. The Mathews balancing test employs a burden-shifting scheme where, upon the presentation of the factual assertions by the government, the detainee must receive a meaningful opportunity to refute them. A burden-shifting scheme of this sort meets the goal of ensuring that one wrongfully classified has a chance to prove error while giving due regard to the Executive once it has put forth meaningful support for its conclusion. Hamdi, 542 U.S. at 534.

The Hamdi court illustrated an example of a high risk of erroneous deprivation, which is not present in this case. The risk of an erroneous deprivation of a detainee's liberty interest is unacceptably high if all individual process is done away with and deemed unwarranted. Hamdi, 542 U.S. at 532-33

(*citing Mathews*, 424 U.S. at 335). Ahmed's individual process was not done away with, and instead he was given every opportunity to refute the factual assertions used against him. Therefore, the risk of erroneous deprivation was evaded.

Because Ahmed was afforded the same process as a citizen-detainee, the burden-shifting scheme was employed during the challenge of his classification. Processes of this sort sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. *Hamdi*, 542 U.S. at 534 (*quoting Mathews*, 424 U.S. at 335). Regardless of the time and place of capture, the presence of this burden-shifting scheme sufficiently addressed the possibility of erroneous deprivation.

#### Conclusion

We therefore ask that this Court affirm the Twelfth Circuit's holding that the President's possess the authority to detain Ahmed, and that it overrule the holding that Ahmed was not afforded sufficient due process under the Constitution.