

No. 08-11144

**IN THE
SUPREME COURT OF THE UNITED STATES**

BURHAN UDDIN AHMED,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

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

BRIEF OF RESPONDENT

January 15, 2010

Team No. 5712

QUESTIONS PRESENTED

1. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes, and if so whether the Constitution allows, the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?

2. Whether the process afforded by the district court to challenge a designation as an "enemy combatant" was sufficient under the requirements of the Fifth Amendment?

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STANDARD OF REVIEW

In reviewing the consideration of the power of the Authorization to Use Military Force resolution to indefinitely detain enemy combatants and the processes afforded them, the Supreme Court should review the Circuit Court's decision de novo. *Salve Regina Coll. V. Russell*, 499 U.S. 225 (1990).

OPINIONS BELOW

The United States District Court of East Dakota denied a petition for a writ of habeas corpus brought by Burhan Uddin Ahmed (Ahmed). Ahmed appealed the district court's decision denying his habeas petition, and a panel of the Court of Appeals for the Twelfth Circuit affirmed the district court's dismissal. Subsequently, Ahmed moved for a rehearing, and the court decided to vacate the panel opinion and hear the case en banc. Upon rehearing, the court reversed and remanded the district court's dismissal requiring the district court to examine the sufficiency of the evidence produced by the government. The Supreme Court of the United States granted certiorari to the appeals of Ahmed and the government.

STATEMENT OF FACTS

On September 11, 2001, the al Qaeda terrorist network was responsible for hijacking United States based commercial airliners and using them as guided missiles to attack the prominent world trade towers in New York City. Nearly 3,000 Americans and other people perished in these attacks. Congress responded one week later by passing a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." AUMF, 115 Stat. 224.

Ahmed, a Pakistani citizen, lawfully entered the United States with his family on September 8, 2001, to pursue a doctor of veterinary medicine degree at Wilson University in Wilson, East Dakota. Four months later, on January 3, 2002, federal agents arrested Ahmed in Wilson as a material witness in the government's investigation of the 9/11 attacks. Ahmed was detained in Wilson.

In November 2002, Ahmed was charged in the District of East Dakota with the possession of counterfeit Social Security cards with the intent to defraud. In January 2003, Ahmed was further charged with making a false statement to the FBI. Ahmed pleaded not guilty to all charges. On June 13, 2003, the government filed an ex parte motion to dismiss the indictment based on an

order signed that morning by the President of the United States. The President's order stated that he had "determined for the United States of America that "Ahmed: (1) is an enemy combatant; (2) is closely associated with al Qaeda; (3) "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism"; (4) "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda"; and (5) "represents a continuing, present, and grave danger to the national security of the United States." The FBI conducted a thorough search of Ahmed's laptop computer that revealed a plethora of incriminating evidence against him. The FBI uncovered research on using chemicals as weapons of mass destruction, computer hacking information, Arabic lectures on the importance of jihad and martyrdom and on the merits of the Taliban regime in Afghanistan. Ahmed is a Pakistani citizen who attended an al Qaeda sponsored terrorist training camp and specialized in poisons. The President further determined that Ahmed's detention by the military was "necessary to prevent him from aiding al Qaeda." He thus ordered the Attorney General to surrender Ahmed to the Secretary of Defense, and directed the Secretary of Defense to "detain him as an enemy combatant." The District of East Dakota granted the government's motion to dismiss the criminal charges against Ahmed, and Ahmed was then transferred to military custody and brought to the Army Regional

Consolidated Detention Facility in Souds, East Dakota. Since that time, the military has held Ahmed as an enemy combatant without charge or trial. He has been given no indication as to when his detention will end.

SUMMARY OF THE ARGUMENT

The decision of the Twelfth Circuit Court pertaining to the authority of the AUMF to capture and detain a suspected terrorist for an indefinite time based on government assertions that the conspired with al Qaeda is correct and should be affirmed.

The president has the power to wage war as declared by Article II of our constitution. As our Commander in Chief has the authority to decide who are enemy combatants and then capture and detain them for the term of hostilities. The Supreme Court has established that, when the President acts with the express or implied authorization of Congress, his authority is at its maximum, for it includes everything he possesses alone in addition to all that Congress instills in him.

The AUMF authorizes the President to detain and organization or persons that he determines to be an enemy combatant, which includes Ahmed who is a member of al Qaeda. Any person fighting against the United States as part of any organization aiding or responsible for the terrorist attacks on the World Trade Center are exactly the group of individuals that Congress intended the AUMF to

apply to. The AUMF specifically states, in its attempt to protect our citizens, that the President is authorized the use necessary force against nations, *organizations*, and *people* who brought about the attacks on September 11th, 2001. The present circumstances demonstrate that our traditional notion of war and battlefields are changing and as stated by the Circuit Court, we should not focus on minor differences between what we have seen before and what we are dealing with now.

The respondents in this case are the members of the government tasked with ensuring the continued national security of the nation. During the 21st century, warfare has undergone a drastic change. Frequently, enemies do not wear uniforms; rather, terrorist organizations have sent sleeper agents into the American homeland to disrupt and destroy while posing as legal residents of the United States. Recent actions taken by Congress indicate the policy that has arisen with respect to the rise of international terrorism.

The tactics employed by agents of terrorist organizations, such as al Qaeda, require the government to create procedures that can discover and apprehend potential enemies. Since the element of surprise is paramount on the field of battle, the procedures employed by the Federal Bureau of Investigation (FBI) must be preserved. Consequently, the disclosure of information outside the Murphy Declaration risks compromising the procedures maintaining

national security. Due to the burden of national security bestowed on the government, the Murphy Declaration should be considered the most reliable evidence justifying the petitioner's classification as an enemy combatant.

Since the government has designated the petitioner as an enemy combatant, the process afforded to him by the Fifth Amendment should be governed by the *Hamdi* framework. Pursuant to the *Hamdi* framework, the government provided the petitioner with the factual basis for his classification and the district court afforded the petitioner an opportunity to refute the government's assertion before a neutral decision maker. The district court complied with the *Hamdi* framework; therefore, the district court's handling of this case did not infringe on the petitioner's Fifth Amendment rights.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT THE PRESIDENT HAS THE AUTHORITY TO DETAIN AHMED AS AN ENEMY COMBATANT

The president has the power to wage war as declared by Article II of our constitution. As our Commander in Chief has the authority to decide who are enemy combatants and then capture and detain them for the term of hostilities. This includes persons who may or may not be citizens. *Ex parte Quirin*, 317 U.S. 1 (1942). After the local authorities captured Ahmed in East Dakota in the process of planning and aiding in attacks on the United States, the local authorities turned Ahmed over to the military. Once the

president determines him to be an enemy combatant, the military has the authority to hold him in connection with any ongoing hostilities.

The Supreme Court has established that, "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." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). When Congress enacted Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF) it endowed the President with the authority 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. AUMF, 115 Stat. 224.

A. The President has the Power to Detain Enemy Combatants Under the AUMF

United States v. Salerno establishes that persons cannot be arrested inside American borders and detained by the military unless they fall within a narrow exception. 481 U.S. 739, 755 (1987). Enemy combatants such as Ahmed fall under this narrow exception during ongoing hostilities and may be detained for the duration of these hostilities. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519-21 (2004). The AUMF authorizes the President to detain and

organization or persons that he determines to be an enemy combatant, which includes Ahmed who is a member of al Qaeda.

The Supreme Court established in *Hamdi v. Rumsfeld* that any person fighting against the United States as part of any organization aiding or responsible for the "terrorist attacks on September 11th, 2001 are the individuals Congress intended to target in passing AUMF". *Hamdi*, 542 U.S. at 518. Hamdi was an American citizen captured in Afghanistan by U.S. allies and turned over to the U.S. military there. He was determined to be an enemy combatant and shipped back to the United States and detained there. *Id.* at 50. Nothing in the AUMF states that the enemy combatant must be fighting or captured abroad; it is silent on that aspect, allowing for domestic captures and detaining of enemy combatants. The AUMF does not specifically mention detaining; it only authorizes all necessary and appropriate force, including detention. The *Hamdi* Court held that, "The detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted in incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* Furthermore the *Hamdi* court held, "Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force, 'Congress has clearly

and unmistakably authorized detention in the narrow circumstances considered here.” *Id.* at 519.

Other courts have recently examined AUMF across different situations. The Fourth Circuit found that the AUMF authorized the detention of an American citizen discovered to be affiliated with al Qaeda and fought against American forces overseas and came back to our shores with the intent of bringing that war to our land. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). The Fourth Circuit analogized their case to the Supreme Court decision in *Ex parte Quirin*, where an American citizen sympathized with Nazis and entered our borders with the intent to destroy domestic war facilities but was captured before he could complete them just as Ahmed in the case at hand. *Ex parte Quirin*, 317 U.S. 1 (1942).

The court in *Gherebi v. Obama* also found support for the Presidents authority to detain enemy combatants under the AUMF. 609 F.Supp 2d 43 (D.D.C. 2009). “The reality is that Congress authorized the same use of military force, and thus conferred upon the President the same degree of detention authority, with respect to “organization” responsible for the 9/11 attacks as it did with respect to the “nations” responsible for those attacks.” *Id.* At 62. When examining the scope of the President’s detention authority the court further held “as a matter of law that, in addition to the authority conferred upon him by the plain language of the AUMF, the President has the authority to detain persons who were part of, or

substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, provided that the terms "substantially supported" and "part of" are interpreted to encompass only individuals who were members of the enemy organization's armed force, as that term is intended under the laws of war, at the time of their capture." *Id.* at 70-71.

The petitioner may argue that as a civilian residing legally in the United States, that he is afforded certain protections. Namely "[f]reedom from imprisonment, "government custody, detention, or other forms of physical restraint" as guaranteed by the Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). However, those protections do not apply similarly to enemy combatants. As soon as Ahmed began to conspire with al Qaeda destructively against our nation, he forfeited his civilian status in exchange for that of enemy combatant, and with his civilian status went those constitutional protections afforded to civilians.

B. Applicability of the AUMF to al Qaeda

The decision of the Twelfth Circuit Court determining that the AUMF applies to al Qaeda is correct and should be affirmed. Ahmed may argue that he technically did not take up arms against the United States as was the case in *Quirin* and *Hamdi* or because he is not affiliated with a nation-state such as the Taliban or Afghanistan. However he entered our country with pernicious

intent. Ill intention is taking up arms against our country, as it is only a matter of time before Ahmed put his nefarious plan to work. Just like Ahmed, the September 11th attackers entered our country with the very same ill intent.

The AUMF specifically states, in its attempt to protect our citizens, that the President is authorized the use necessary force against nations, *organizations*, and *people* who brought about the attacks on September 11th, 2001. AUMF, 115 Stat. 224. Al Qaeda is the organization responsible for those attacks and clearly falls under the group targeted by Congress when it enacting AUMF. Furthermore, the original attacks that brought about the passage of the AUMF were not fought on a foreign battlefield showing that it is not necessary that enemy combatants actually take up arms against our troops on a particular foreign field.

The present circumstances demonstrate that our traditional notion of war and battlefields are changing and as stated by the Circuit Court, "We should not be distracted by superficial differences between al Qaeda and other enemies we have faced." Page 15. To claim that al Qaeda should not fall under the targeted groups would be preposterous and a risky underestimate of al Qaeda's dangerous propensity. With a single planned attack al Qaeda killed 3,000 Americans and caused hundreds of millions of dollars in property damage; it was the single worst

attack on our soil in our history. "The unconventional aspects of the present struggle do not make its stakes any less grave." *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). See also *Padilla v. Hanft*, 423 F.3d at 389 (noting that al Qaeda is "an entity with which the United States is at war"). Ahmed is not noticeably different from the soldiers in *Quirin* who infiltrated our borders with the intent to bring harm to our country and its citizens. The fact that Ahmed or others do not belong to a traditional or formal military arm of a foreign nation does not exclude them from appropriately being detained under the authorization of the AUMF.

Ahmed may argue that the precedent established by the Supreme Court in *Ex parte Milligan*, 71 U.S. 2 (1866), should bring the contrary decision. However this case is distinguishable from the case at hand in two ways. Firstly, during *Milligan*, the AUMF did not exist therefore not authorizing any military force against an organization, whereas in the current case, Congress explicitly authorized military force against Ahmed's al Qaeda. See *Milligan*, 71 U.S. at 6. Secondly, *Milligan* had already been determined not to be an enemy combatant thereby distinguishing him from Ahmed in the present case. Ahmed is an enemy combatant as determined by the President under the authorization provided by AUMF. 115 Stat. 224.

C. The President's Inherent Constitutional Power

The decision of the Twelfth Circuit Court regarding the President's inherent constitutional power should be affirmed. Article II of our Constitution establishes that there are certain inherent powers vested in the President. "The executive Power shall be vested in a President . . . "; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Congress enacted AUMF in the wake of the September 11th tragedy to help prevent a repeat of such an atrocity. With the enactment of AUMF, Congress instilled in the President, as the executive branch, the power to see that this law is faithfully carried out as per Article II of our Constitution. "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.* At 635.

As Commander in Chief of America's military the president has the constitutional power to wage war as per Article II. "The president has in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nations' organ in foreign affairs." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948). Congress, with

the power vested in it by the United States Constitution passed the AUMF, in which used explicit and clear language to provide the President with the power to designate enemy combatants and detain them.

The Petitioner may argue the opposite that the President, in fact, is not acting within the express authority of Congress when detaining enemy combatants. Congress passed the "Patriot Act" after the AUMF. The Patriot Act expressly prohibits indefinite detention by requiring the Attorney General to begin with "removal proceedings" or to "charge the alien with a criminal offense" "not later than 7 days after the commencement of such detentions." Patriot Act § 412(a); 8 U.S.C. § 1182(a)(3)(A)-(B); *see also* 8 U.S.C. § 1227(a)(4)(A)(iii), (a)(4)(B). The Patriot Act allows the Attorney General to detain any alien whom he reasonably believes (1) "seeks to enter the United States" to "violate any law of the United states relation to espionage or sabotage" or to use "force, violence, or other unlawful means" in opposition to the government of the United States; (2) "has engaged in a terrorist activity," or (3) is "likely to engage after entry in any terrorist activity," has "incited terrorist activity," is a "representative" or "member" of a "terrorist organization," is a "representative" of a "group that endorses or espouses terrorist activity," or "has received military-type training" from a terrorist organization. *Id.* At

first glance the Patriot Act might appear to limit or overrule the AUMF but it does not. The Patriot Act uses terms different from that of the AUMF, establishing Congress's wish for them to apply these laws to different contexts. The AUMF is to be applied in wartime and the Patriot Act is to be applied to non-wartime.

The Patriot Act applies to alien terrorists, who Ahmed would be if the United States were not at war with his organization, al Qaeda. Ahmed is not an alien terrorist and was not at the time of his arrest; he was and is an enemy combatant subject to the AUMF's authority. The Patriot Act also authorizes the Attorney General to make the decisions regarding alien terrorists further implying that the Patriot Act applies to non-war situations. However, the AUMF directly authorizes the President as our Commander-in-Chief to make decisions regarding enemy combatants during a war period. The Patriot Act does not apply to enemy combatants such as Ahmed. If Congress wished for the Patriot Act to apply to enemy combatants, it would have expressly stated it instead of using a new vocabulary when drafting the Patriot Act.

D. Designation of Ahmed as an Enemy Combatant

The designation of Ahmed as an enemy combatant is correct and the decision of the Twelfth Circuit Court should be affirmed. According to the Murphy Declaration we can see that Ahmed's

entire purpose for entering our country is a complete sham. These accusations are further buttressed by his very actions. He was clearly not a student interested in earning a veterinary degree provide his frequent absences from class and failing grades after only one semester. Ahmed's mission is no different than that of the German operative in *Quirin*.

The FBI conducted a thorough search of Ahmed's laptop computer that revealed a plethora of incriminating evidence against him. The FBI uncovered research on using chemicals as weapons of mass destruction, computer hacking information, Arabic lectures on the importance of jihad and martyrdom and on the merits of the Taliban regime in Afghanistan. An investigation into calling cards and cellular phone records linked to Ahmed showed several attempts to contact a high-ranking al Qaeda officer living in the United Arab Emirates. Several more calls were made to that number from pay phones in the area. Furthermore, in Ahmed's laptop carrying case were almost 40 social security cards with the names of the original owners; the laptop search exposed efforts to sell these social security numbers. It is assumed that any profit from these sales would go to further funding of terrorist activities. Ahmed has received substantial financial funding from Mustafa Ahmed al-Hawsawi, who is also the financial facilitator of the September 11th attacks. Ahmed is a Pakistani citizen who

attended an al Qaeda sponsored terrorist training camp and specialized in poisons.

The definition of an enemy combatant has been established by the Fourth Circuit in *Boumediene v. Bush*, 583 F.Supp. 2d. 133, 135 (D.D.C. 2008). The court held this definition to be "blessed by Congress when, in drafting the Military Commissions Act, Congress, in defining the term 'unlawful enemy combatant,' specifically provide that it included persons who had been' determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the president or the Secretary of Defense. "Enemy combatant was 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," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Gherebi v. Obama*, 609 F.Supp. 2d 43 (D.D.C. 2009) (quoting *Boumediene v. Bush*, 583 F.Supp. 2d at 135). Ahmed is clearly a terrorist whose sole purpose for coming to our country is to bring about our demise. From the moment he came to our shores he has been a pernicious agent of al Qaeda. He is undoubtedly an enemy combatant as described by the AUMF and was correctly identified as such by the President thereby falling into the limited category of

individuals for which the AUMF authorizes detention.

II. The requisite due process afforded individuals classified as “enemy combatants” is formulated through the *Hamdi* framework; therefore, the district court satisfied the standards established by the Fifth Amendment by properly applying the *Hamdi* framework in the petitioner’s case

History judges societies by the way the community treats its citizens. The Constitution of the United States protects the freedoms of the citizenry by establishing precepts that cannot be controverted by the government for political expediency. Among the many celebrated protections inherent to the Constitution is the assurance that citizens will not be erroneously “deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

Every officer of the court has an inherent duty to preserve the precepts of the Constitution and ensure the sustainability of this free society by ensuring that the government does not erroneously deprive a citizen of his life, liberty, or property. A cursory understanding of the American Constitution may suggest that Constitutional protections only pertain to citizens; however, a series of cases establish that the protections afforded by the Due Process Clause extend to legal residents of the United States, a group to which the petitioner belongs. See *Wong Wing v. United States*, 163 U.S. 228, 242 (1896) (“A resident, alien born, is

entitled to the same protection under the laws that a citizen is entitled to."); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008) ("the Constitution's . . . substantive guarantee[] of the Fifth . . . protects persons as well as citizens [including] foreign nationals . . .").

Just as the Supreme Court has extended Constitutional protections to legal residents, the Court has established a mechanism for determining the requisite due process afforded individuals designated "enemy combatants" by the American government. Therefore, the protections of the Due Process Clause extending to the petitioner can be found in the Court's opinion in *Hamdi v. Rumsfeld*.

A. The *Hamdi* framework determines the requisite process afforded to the petitioner who has been designated an "enemy combatant" by the United States government and has been assigned indefinite detention

"Due process" is an exceedingly vague phrase that contains significant implications. Nonetheless, this phrase encapsulates two important principles: the requirement of notice and the opportunity for a hearing. See *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of . . . liberty . . . 'be preceded by notice and opportunity for a hearing appropriate to the nature of the case.'" (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339

U.S. 306, 313 (1950))). However, the Due Process Clause does not establish a uniform standard by which courts can address whether an individual was afforded the requisite amount of process before deprivation.

Consequently, the Supreme Court devised a balancing test in *Mathews v. Eldridge* to determine the degree of process afforded individuals in differing contexts. The *Mathews* test put forth three factors to be considered in a due process calculation:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards; and finally, the Government's interest.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). When the question revolving around the process afforded individuals designated "enemy combatants" came before the Court, the Court utilized the *Mathews* test to devise the *Hamdi* framework.

The *Hamdi* framework begins with the premise that a legal resident "seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the [g]overnment's factual assertions before a neutral decisionmaker [sic]." *Hamdi v. Rumsfeld*, 542 U.S. at 533. However, the Court recognizes the unique burden placed on the government within the context of the War on Terror; thus, the Court suggests that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential

to burden the Executive at a time of ongoing military conflict.” *Id.* For example, the Court proposes a burden-shifting scheme whereby the government produces evidence, which may include hearsay, that would validate a “enemy combatant” designation. *Id.* Once the government has put forth credible evidence indicating such a designation, the onus would shift to the detainee to produce persuasive evidence rebutting the government’s evidence. *Id.* at 534. However, the Court limits the scheme established by the *Hamdi* framework to cases involving individuals designated as “enemy combatants” whom the government has decided to indefinitely detain. *Id.*

The Due Process Clause requires that individuals receive notice of impending deprivation and an opportunity for a meaningful hearing. In *Hamdi*, the Court instilled these precepts into the process afforded individuals designated as “enemy combatants.” Moreover, the Court protected the government’s interests by allowing enemy combatant proceedings to be tailored to differing circumstances thereby alleviating a portion of the burden resting on the government. Whether buried under the “rubble of war,” *Id.* at 532, or whether hidden in the shadows, the *Hamdi* framework provides the most effective and appropriate recourse available to the petitioner.

B. The process afforded the petitioner pursuant to the *Hamdi* framework was appropriate considering the petitioner's status as an enemy combatant and the facts contained in the Murphy Declaration

On June 13, 2003, the President of the United States signed an order designating the petitioner as an "enemy combatant." Soon after, a magistrate judge applied an incarnation of the *Hamdi* framework to the petitioner's circumstances and determined that the government must provide the petitioner with notice of the factual basis supporting his designation. To this end, the government submitted a document, termed the "Murphy Declaration," detailing the facts against the petitioner. The magistrate judge concluded that the Murphy Declaration sufficed to shift the burden of refuting his designation onto the petitioner. Ultimately, the petitioner responded with a general denial and did not offer evidence refuting the facts provided by the Murphy Declaration.

For a myriad of reasons, the magistrate judge properly applied the *Hamdi* framework to the petitioner's circumstances. First, the petitioner's situation mirrors the circumstances surrounding Hamdi. American allies apprehended Hamdi in Afghanistan while he fought the United States as an ally of the Taliban. 542 U.S. at 510. Moreover, the Court in *Hamdi* recognized that the Taliban supported the al Qaeda terrorist network. *Id.* at 518. Consequently, the suggestion that Hamdi would support the actions of a terrorist organization supported by the militia he served is not an

outlandish notion. The government offered the Mobbs Declaration, a document similar to the Murphy Declaration, to support Hamdi's enemy combatant designation. *Id.* at 512.

Recognizing Hamdi's allegiance to an enemy of the United States, the Court produced the framework that determines the process afforded individuals designated enemy combatants including the petitioner. Similar to Hamdi, the petitioner supported an enemy of the United States by meeting with Osama Bin Laden, head of the terrorist network al Qaeda, entering the United States with the intent to further al Qaeda's cause against the United States and the nation's citizens, and aiding al Qaeda operatives entering the United States intent on causing destruction. The facts inherent to the Murphy Declaration clearly show that the petitioner supported and aided an enemy of the United States. Since the petitioner has been designated as an enemy combatant within the context of the War on Terror and has aided an enemy of the United States, the *Hamdi* framework is the controlling test to determine the amount of process afforded the petitioner.

With a correct application of the *Hamdi* framework, the district court sufficiently supplied the petitioner with due process. The Murphy Declaration offered by the government provided the petitioner with notice of the factual basis supporting his classification; in fact, the magistrate judge, acting as a neutral decisionmaker, stated that the Murphy Declaration sufficed to shift

the onus of production onto the petitioner. The petitioner responded with a general denial of the facts included in the Murphy Declaration.

Under the *Hamdi* framework, the petitioner received notice and an opportunity to refute his designation before a neutral decisionmaker. He responded with a general denial. The petitioner's denial does not suggest nor invalidate the fact that he received sufficient process under the Fifth Amendment. Conversely, the district court followed the procedures of the *Hamdi* framework; therefore, the district court sufficiently afforded the petitioner the process required to challenge his designation as an enemy combatant.

Moreover, the district court's characterization of the Murphy Declaration was correct. The *Hamdi* Court found that "the exigencies of the circumstances may demand that . . . enemy combatant proceedings may be tailored to alleviate their uncommon potential burden to the Executive at a time of on-going military conflict." *Hamdi*, 542 U.S. at 533. Given the subversive and secretive nature of al Qaeda's operatives, the circumstances confronting the FBI demand that these enemy combatant proceedings be tailored similar to the circumstances in *Hamdi*.

Producing non-hearsay evidence in this case would require government officials to disclose their techniques for detecting and apprehending al Qaeda sleeper agents plotting attacks on American

soil. Although much of the information is not buried in the rubble of Afghanistan, the procedures employed by the FBI are shrouded in secrecy in order to maintain their effectiveness against al Qaeda. Requiring the government to disclose its procedures would weaken the FBI in its war against al Qaeda and strengthen the enemy that threatens the American homeland.

The secretive nature that characterizes the FBI's war with al Qaeda implies that the Murphy Declaration is the most reliable evidence in this case. Moreover, significant policy directives demand that the *Hamdi* framework be applied to the petitioner's situation.

C. Given the secretive quality inherent to the nature of America's contemporary enemies, the district court's imposition of the *Hamdi* framework preserves the integrity of the Fifth Amendment while protecting the citizenry of the United States from future attacks

Throughout the 20th century, battlefields facing the American military have spanned from the beaches of Normandy to the sands of the Middle East; in fact, the closest attack to the continental United States occurred at Pearl Harbor. Contrary to popular knowledge, the continental United States has been a battlefield in the past. In *Ex Parte Quirin*, several individuals loyal to the Nazi party in Germany and carrying explosives entered the United States in June 1942 with the intent to destroy war facilities in New York and Florida. 317 U.S. at 7. Once inside the country, the

conspirators dressed in civilian clothing to better move among the citizenry, but the Federal Bureau of Investigation (FBI) apprehended them before they were able to carry out their attacks. *Id.*

Through the actions of the conspirators in *Ex Parte Quirin*, the Court addressed the implication of enemy belligerents during wartime. “[E]ntry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property . . . is a hostile and war-like act.” *Id.* at 36-7. Interestingly, the Court indicates that the enemy belligerents entered the United States through the direction of the “enemy.” *Id.* This particular vernacular employed by the Court suggests that the concept of enemy belligerents may extend to areas outside of traditional notions of enemies; in fact, the notion of enemy belligerents should extend to individuals acting under the direction of villainous organizations confronting the United States.

Similar to the conspirators in *Ex Parte Quirin*, the petitioner entered the United States under direction from al Qaeda, which can be inferred from the facts found in the Murphy Declaration. Rather than civilian clothes, the petitioner hid behind a valid visa and attended a university. Nonetheless, his ultimate goal was to bring war to the continental United States. As such, his actions constitute “hostile and war-like acts,” *Id.* at 37; therefore, the

petitioner should be considered analogous to the enemy belligerents found in *Ex Parte Quirin*.

Although the petitioner's actions mirror the actions of the conspirators in *Ex Parte Quirin*, the circumstances surrounding the petitioner differ from the historical context of *Ex Parte Quirin*, which occurred during the course of World War II. In *Ex Parte Quirin*, the Court utilized the term "enemy belligerent" to classify the conspirators; however, the enemies threatening the United States in the 21st century require their own classification. Thus, the notion of "enemy combatants" arose to classify hostile individuals operating under the direction of American enemies and terrorist networks. The danger posed by the petitioner justifies the classification of "enemy combatant" and the process afforded to an individual of his designation. In fact, the policy inherent to recent Congressional acts suggest a widening of the term "enemy" to include organizations as well as states.

In 1996, the passage of The Anti-Terrorist and Effective Death Penalty Act indicates Congress's awareness of the danger posed by international terrorism. The law effectively "criminalized the act of providing material support or resources to foreign terrorist organizations." Randolph N. Jonakait, *A Double Due Process Denial: the Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. Sch. L. Rev. 125, 125

(2003/2004). The passage of such a law foreshadowed the horror that would occur on the morning of September 11th.

The worst attack on American soil did not come from the military wing of a nation; instead, a shadowy terrorist organization struck the United States on September 11th. After the attacks, prosecutions pursuant to the Anti-Terrorist and Effective Death Penalty Act increased. *Id.* The rise of al Qaeda and the increase in terrorism-related prosecutions hearkened the dawning of a new age. In such a new age, enemies do not wear uniforms and declare allegiance; rather, the tactics of al Qaeda and similar organizations shift the war from distant battlefields and bring the violence to the homeland.

The passage of the AUMF reflects Congress's attempt to address the danger posed by terrorism. The AUMF authorized 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." 115 Stat. 224 (emphasis added). Congress clearly recognized the danger posed by al Qaeda.

The passage of the Anti-Terrorist and Effective Death Penalty Act and the AUMF suggest a growing policy against terrorism. Such a policy indicates a trend to equate terrorist organizations with malcontent states. No longer can a distinction be drawn between enemies originating from a state and transnational enemies because

the danger posed by both enemies is too great. For this reason, Hamdi's circumstances do not differ from the petitioner's situation. Although Hamdi acted under the Taliban regime and the petitioner acts in accordance with al Qaeda, both men are enemies of the United States, and both men have been designated as enemy combatants. Consequently, both individuals should be afforded the same procedures ensuring due process.

The district court correctly applied the *Hamdi* framework to the petitioner's case. Existing case law and public policy demand that the process afforded the petitioner be tailored to the circumstances implicit in the war against al Qaeda and terrorism. The district court's decision ensured the petitioner received the process afforded to him by the Fifth Amendment while protecting American citizens by respecting the government's procedures for maintaining national security.

CONCLUSION

Respondents respectively request the Court to uphold the decision of the Twelfth Circuit Court regarding the authorization of the AUMF to indefinitely detain enemy combatants. We also request that the Twelfth Circuit Court's holding with regard to the process afforded to detained enemy combatants be reversed.

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.

