

No. 08-11144

In the
Supreme Court of the United States

Burhan Uddin Ahmed,

PETITIONER,

v.

THE UNITED STATES OF AMERICA,

RESPONDENT.

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

BRIEF FOR THE RESPONDENT

Team Number: 6147

QUESTIONS PRESENTED

- I. Was the Twelfth Circuit correct in holding that the Authorization for Use of Military Force authorizes and the Constitution allows for the seizure and indefinite 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.

- II. Was the process afforded by the district court to challenge a designation as an "enemy combatant" sufficient under the requirements of the Fifth Amendment?

PARTIES TO THIS PROCEEDING

Pursuant to Supreme Court Rule 24.1(b), the parties to this proceeding are as follows:

Petitioner,

Burhan Uddin Ahmed (a legal immigrant classified as an enemy combatant),

Respondent,

The United States of America.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

U.S. Const. art. II sec. 2 cl. 1:

The President shall be Commander in Chief of the Army and Navy of the United States

U.S. Const. art. II sec. 3 cl. 4:

[The President] shall . . . take Care that the Laws be faithfully executed

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 the 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.

Statutory Provisions

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

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 Requirement.

D. 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.

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

Approved September 18, 2001.

28 U.S.C.A. § 2241

(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.

JURISDICTION

The Court of Appeals entered its judgment on November 24, 2008. The petition for writ of certiorari was granted on October 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROCEEDINGS BELOW

Petitioner, Burhan Uddin Ahmed, filed for a writ of habeas corpus in United States District Court in the District of East Dakota challenging his military detention as an "enemy combatant." [R. 8]. As part of his petition for a writ, Ahmed asserted that the Respondent, Government, must either charge him criminally or else release him. *Id.* Alternatively, Petitioner argued that even if the Government had the authority to detain him as an enemy combatant, Petitioner should be afforded a hearing to determine his status. *Id.*

The Government opposed Ahmed on his motion by arguing that the President has the statutory and constitutional authority to detain Petitioner and that the Government provided petitioner with adequate process to challenge his status. *Id.* To that end, the Government provided the district court with a hearsay document, the Declaration of John R. Murphy (Murphy Declaration), who is the Director of the Joint Task Force for Combating Terrorism, detailing Ahmed's involvement with al Qaeda. *Id.* In this document, Murphy identified to the court the

intelligence information that served as a basis for the enemy combatant status.

Upon examining the available evidence, the District Court agreed that Ahmed could be detained as an enemy combatant, but concluded that he was entitled to challenge the factual basis of his detention pursuant to his procedural due process rights. *Id.* at 9. Following this ruling, the District Court sent the case to a magistrate judge to determine the process by which Ahmed could challenge his detention. *Id.*

The magistrate judge rejected Ahmed's argument that he had a right to the same safeguards afforded to criminal defendants and instead directed the Government to provide notice of the factual basis of the detention and to produce credible evidence supporting his designation as an enemy combatant. *Id.* If the Government produced credible evidence, then the burden would shift to Ahmed to produce more persuasive evidence to refute the designation. *Id.* Finally, if Ahmed could satisfy his burden, then the Government would be forced to either release him or afford him a full adversarial hearing. *Id.*

With this framework in place, the magistrate judge concluded the Murphy Declaration provided adequate notice and offered sufficient evidence that Ahmed was an enemy combatant. *Id.* Based on this ruling, the magistrate judge gave Ahmed 60 days to present rebuttal evidence but Ahmed responded with a

general denial asserting that he was not an enemy combatant, insisting that the procedures were unconstitutional and that he should not be forced to prove his own innocence. *Id.* at 9-10. According with this refusal to present evidence, the magistrate judge recommended dismissal of Ahmed's petition and the District Court agreed. *Id.* at 10.

Subsequently, Ahmed appealed the district court's decision to the Twelfth Circuit, whereupon the Twelfth Circuit affirmed the district court's dismissal. *Id.* Ahmed moved to rehear the case en banc and the Twelfth Circuit granted the rehearing. *Id.*

During the rehearing, the Twelfth Circuit dealt with the same two questions that are on appeal now to this Court. Upon rehearing the arguments, the Twelfth Circuit affirmed in part, reversed in part and remanded the case for further proceedings in the district court. *Id.* at 29. Specifically, the Twelfth Circuit affirmed as to the question of the President's authority to detain an enemy combatant indefinitely, but reversed as to the sufficiency of the procedural safeguards afforded to Ahmed to challenge his designation as an enemy combatant. *Id.* On October 2, 2009, the United States Supreme Court granted certiorari on these questions. *Id.* at 1.

STATEMENT OF THE FACTS

On September 11, 2001, the al Qaeda terrorist network hijacked four commercial airliners and proceeded to use them as guided missiles targeting the World Trade Center in New York and the Pentagon in Arlington, VA. The events led to over 3000 civilian deaths in New York, Arlington and Pennsylvania. A week later, Congress responded 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.

Petitioner Burhan Uddin Ahmed ("Ahmed"), a citizen of Pakistan, entered the United States with his family on September 8, 2001, to study veterinary medicine in Wilson, East Dakota. (R. at 7). He was arrested and detained on January 3, 2002 as a material witness in the government's investigation of the September 11, 2001 terrorist attacks. *Id.* In November 2002 Ahmed was charged with possession of counterfeit Social Security cards with the intent to defraud. *Id.* In January 2003 he was also charged with making a false statement to the FBI. *Id.*

Ahmed pleaded not guilty to all charges and trial was set for July 17, 2003, in district court. *Id.* On June 9, 2003 the court set a pretrial motion hearing for June 15, 2003. *Id.* The

motions included a motion to suppress evidence petitioner alleged was obtained by torture. *Id.* On June 13, 2003, the United States government filed an ex parte motion to dismiss the indictment based on a Presidential order signed that day. *Id.*

The President ordered that Ahmed be surrendered to the Secretary of Defense and detained as an "enemy combatant" on the following grounds. *Id.* The President determined that Ahmed was an enemy combatant, closely associated with al Qaeda and engaging in "hostile and war-like acts" in preparation for terrorism. *Id.* The order further stated that Ahmed would be able to provide critical information to U.S. intelligence in order to prevent, and that Ahmed posed a "continuing, present and grave danger" to U.S. national security. *Id.* According to the order, Ahmed's detention was considered "necessary to prevent him from aiding al Qaeda". *Id.* The district court granted the government's motion, and is presently holding Ahmed in military custody as an enemy combatant. *Id.* at 7-8. Because of his status as an enemy combatant, he has not been charged or tried and no release date has been given. *Id.* at 8.

SUMMARY OF THE ARGUMENT

The President has the authority to detain the Petitioner as an enemy combatant under the Authorization for Use of Military Force (AUMF) and from his inherent constitutional power to wage war pursuant to Article II of the United States Constitution. By targeting organizations or nations who planned and committed the September 11 attacks, AUMF explicitly defines al Qaeda as an enemy and treats its members as combatants in the war since al Qaeda is an "organization" that planned and carried out the attacks. This categorization of al Qaeda members as enemy combatants is not contrary to legal precedent or the laws of war.

Regardless of statutory authorization, the President retains an inherent constitutional authority to wage war. The Court has recognized that an incident of waging war requires the detention of enemy combatants. This power is only strengthened by the fact that Congress has declared war against al Qaeda through AUMF. The Patriot Act has only altered the President's ability to detain aliens who are not associated with al Qaeda and has not affected the President's ability to detain aliens who are associated with al Qaeda. In addition, the provision regarding detention of lawfully residing alien terrorists in the

Patriot Act speaks to the Take Care Clause of the Constitution, whereas AUMF speaks to the President's power to wage war, and therefore the Patriot Act did not alter the authorization to detain al Qaeda enemy combatants under AUMF.

Ahmed claims that his rights under the fifth amendment of the constitution have been violated by his detention as an enemy combatant. This claim is inaccurate and poorly supported by the record provided. Ahmed received full protection of his rights and only claimed that his fifth amendment rights were violated over a year after his detention began. His reliance on the use of the Murphy declaration is not supported by case law or statute.

He claims that he is entitled to rights and protections under the *Hamdi* case, but fails to show how the facts of *Hamdi* are sufficiently analogous to those of his case. In fact, when compared to *Hamdi*, Ahmed is in a weaker position to argue for protection. *Hamdi* creates requirements to ensure due process for detainees. These requirements include a factual notice, opportunity to rebut asserted facts, and a hearing before a neutral decisionmaker to address disputes.

In this case Ahmed received notice of factual circumstances necessitating his detention, a lengthy period of time to object to it, and failed to raise any issues with the detention until a pretrial hearing. He should not be allowed to manipulate the

United States justice system to his own ends, when he failed to utilize all the resources available to him since his detention.

STANDARD OF REVIEW

When reviewing the district court's consideration of a petition for a writ of habeas corpus, the Court of Appeals reviews the lower court's legal conclusions de novo and its findings of fact on a standard of clear error. *Colvin v. Taylor*, 324 F.3d 583, 586 (8th Cir. 2003).

ARGUMENT

I. THE PRESIDENT HAS THE AUTHORITY TO DETAIN THE PETITIONER AS AN ENEMY COMBATANT.

The Fifth Amendment of the United States Constitution guarantees that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. By the Fifth Amendment's language, the term "person" includes not only citizens but also any alien lawfully admitted to the United States. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding all persons are protected equally under the law including aliens). Since the norm in our society is liberty, deprivation of this liberty without due process is the "carefully limited exception." *See United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding the Bail Reform Act as a constitutionally permissible restriction on a person's liberty before trial). In allowing limited exceptions, the Court has

permitted such exceptions only when they have been authorized by a legislative body. *See, e.g., id.; Schall v. Martin*, 467 U.S. 253, 267 (1984) (finding a New York statute allowing for the pretrial detention of juveniles does not violate the Fifth Amendment). One of the recognized exceptions is the detention of enemy combatants who can be held “for the duration of military hostilities.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

A. The President has authority under AUMF to detain the Petitioner as an enemy combatant.

The Authorization for Use of Military Force in relevant part 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 that occurred on September 11, 2001.” AUMF, Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001). Although AUMF did not explicitly authorize detention, the *Hamdi* Court concluded that the term “necessary and appropriate force” must have included detention of enemy combatants since “prevent[ing] a combatant’s return to the battlefield is a fundamental incident of waging war.” *Id.* at 519.

- i. Courts must grapple with the definition of enemy combatant rather than with whether AUMF provides authority to detain enemy combatants since the Court has made clear that AUMF provides the authority but no relevant definition for enemy combatant.

Insofar as the courts have grappled with the question of the detention of enemy combatants, the harder question has not

been if the President has any authority to detain an enemy combatant under AUMF but rather who can be classified as an enemy combatant. For this reason, the *Hamdi* Court stated at the outset of its analysis that they would only reach the "narrow question" of whether citizens are enemy combatants if they were "'part of or supporting forces hostile to the United States or coalition partners'" in Afghanistan and "'engaged in an armed conflict against the United States.'" *Hamdi*, 542 U.S. at 517. Recognizing this limitation, the Court noted that "[t]he legal category of enemy combatant has not been elaborated upon in great detail" and that "[t]he permissible bounds of the category will be defined by the lower courts" in subsequent cases. *Id.* at 522 n.1. Thus, when the *Hamdi* Court "conclude[d] that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe" the Court was using care to remind readers that the case did not preclude other definitions of enemy combatant. *Id.*

ii. The term enemy combatant relies on law-of-war principles.

In dealing with an issue almost identical in facts to the case now before this Court, the Fourth Circuit Court of Appeals became one of the "lower courts" to grapple with the "permissible bounds" of the definition enemy combatant. While the case produced a disjointed opinion, the judges in *Al-Marri*

v. Pucciarelli offered a rich account of the legal background concerning the issue before this Court. 534 F.3d 213 (4th Cir. 2008), vacated sub nom. *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (vacating the judgment as moot since the government no longer wished to classify the petitioner as an enemy combatant and transferred custody from the Defense Secretary to the Attorney General). The *Al-Marri* Court acknowledged the use of the "law of war" in determining the status of an enemy combatant. See *Hamdi*, 542 U.S. at 518; *ex parte Quirin*, 317 U.S. 1, 37 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."); *ex parte Milligan*, 71 U.S. 2, 121-22 (1866) (arguing that the "usage of war" could not subject a civilian to a military tribunal if he has not been "connected to military service"); *Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005) (citing *Hamdi's* use of "longstanding law-of-war principles").

The treatment of the question of who is an enemy combatant in these cases might lead some jurists to believe that there is a rigid definition under the "law of war." For this reason, Circuit Judge Motz argued that the courts in the cases cited above made "careful distinctions" and all of them rested "enemy combatant status on affiliation with the military arm of an

enemy nation." *Al-Marri*, 534 F.3d 228-30 (arguing that Hamdi and Padilla had been alleged to have fought with the Taliban, Quirin with the Nazis, and Milligan had not been connected to military service). However, such a reading of the cases above would be a narrow reading of their holdings and a skewed interpretation of the laws of war. As noted above, when the Hamdi Court stated that they were answering a "narrow question" the Court did not mean to restrict the meaning of enemy combatant but rather meant to lessen the ruling's effect on a different set of facts. The *Padilla* Court as well did not speak to what an enemy combatant is in every situation but rather analogized the facts of *Padilla* to those in *Hamdi* and concluded that the military detention of Padilla was no different just because Padilla was captured trying to enter the United States rather than on a battlefield. See *Padilla*, 423 F.3d at 391 ("[U]nder the definition of "enemy combatant" employed in *Hamdi*, we can discern no difference in principle between Hamdi and Padilla.").

Rather than examining the definition of an enemy combatant as a static, well-settled definition, some jurists have pointed out that as war has changed so have the definitions. See *Al-Marri*, 534 F.3d 319-22 (Wilkinson, J., concurring in part and dissenting in part) (discussing the debate of how to classify guerilla warriors during the Civil War, the increasing list of unlawful weapons in light of the rise of biological and chemical

warfare, and how the United Nations does not wait for declarations of war but rather regulates "armed conflicts" as there do not need to be declarations for war to exist). As Judge Wilkinson points out, the most important factor that goes into creating a definition of enemy combatant is one that discriminates between an enemy and a non-enemy, and between a combatant and a non-combatant, or civilian. *Id.* at 316.

Though Judge Wilkinson tried to formulate three criteria for an enemy combatant, this Court does not need to take such a measure in order to find that AUMF has authorized to seize and detain Petitioner as an enemy combatant. *See id.* at 325 (To be classified as an enemy combatant a "person must (1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization."). Instead, this Court can look to answer the "narrow question" of whether under AUMF a person who has received training from al Qaeda and who is lawfully present in the country possessing a laptop with information on computer hacking and chemical warfare can be classified as an enemy combatant.

iii. AUMF allows Petitioner to be classified as an enemy combatant.

By classifying the Petitioner as an enemy combatant, the Court must ask itself whether the facts of this case can sufficiently discriminate between an enemy combatant and a non-enemy combatant. As for determining who the enemy is, AUMF makes clear that it targets any nations or organizations that planned or committed the September 11 attacks. See 115 Stat. 224. No major case discussing the recent "war on terror" occurs without a mention of the al Qaeda organization, including cases such as *Hamdi* and *Padilla*. In fact, *Hamdi* makes a point of associating the Taliban with al Qaeda while presenting al Qaeda as the true perpetrators of the September 11 attacks and the Taliban as their supporters. *Hamdi*, 542 U.S. at 518 (Individuals who were "part of the Taliban, an organization known to have supported the al Qaeda terrorist network *responsible* for those attacks, are individuals Congress sought to target in passing the AUMF.") (emphasis added). The Court had no struggle in making al Qaeda the apparent enemy and then using the Taliban's connection to them to implicate their status in the war. Thus, the Court recognizes that the legislation was aimed primarily at al Qaeda and that the Taliban have become enemies not because of their nation-state status but because of their support of al Qaeda.

Since Congress has made every indication that this war is against al Qaeda, then the real concern is discerning between a combatant and non-combatant. However, even on this point AUMF

makes explicit reference to who is the combatant by stating that it targets those that planned and committed the September 11 attacks and those who seek "future acts of international terrorism against the United States." While adhering to old nation-state notions might make this analysis easier formalistically, this would disregard the Court's prior precedent that strongly encourages punishment of unlawful enemy combatants and non-punishment would only perpetuate the enemy's behavior.

In *Quirin*, the Court was careful in highlighting the risk that "unlawful combatants" create by "surreptitiously" entering our territory, discarding their uniforms, and intending to commit hostile acts. *Quirin*, 317 U.S. at 35. While al Qaeda does not have a nation or uniform, this makes them even more dangerous as they can "surreptitiously" enter our country and wage war on the battlefield of their choice ignoring the "laws of war" and fair play. The Petitioner was just as much a combatant in this authorized war as was *Quirin* since Petitioner was captured in this country, did not have any weapons or uniforms and had the intent of committing hostile acts against the United States just like *Quirin*.

By not classifying members of al Qaeda as combatants in a war, such a ruling would disregard AUMF's explicit purpose and would contradict the Court's precedent in viewing such

"surreptitious" conduct not as an end-run around the laws of war but rather as a serious violation of them. *Quirin*, 317 U.S. at 35 n.1 (noting that many acts committed in civilian dress for the enemy could be punishable by death under the "laws of war" as unlawful combatants which wouldn't be so if committed by uniformed soldiers). Thus, AUMF has authorized the President to treat the Petitioner as an enemy combatant and detain him so that he will not reenter the hostilities.

B. The President possesses an inherent constitutional authority to detain the Petitioner and this authority is only strengthened by AUMF.

The powers granted to the President under Article II provide for the President to wage war "as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948). As this Court stated in *Hamdi*, military detention of enemy combatants is a "fundamental incident of waging war." 542 U.S. at 519. Any action of the President that might create an issue over the separation of powers, especially one involving the detention of enemy combatants, would raise "concerns of the highest order." *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring). Thus, the Court should apply Justice Jackson's three-part test to determine whether an executive action was authorized. *Id.*, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

"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*, 343 U.S. at 635. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. And "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.*

- i. Congress delegated the President the power to detain the Petitioner and this authority has not been reversed with subsequent legislation.

As discussed in earlier sections, AUMF has provided the authority for the President to classify the Petitioner as an enemy combatant. Thus, the President's inherent power is strengthened under the *Youngstown* framework that states the President's power is at "its maximum" when he acts in his own right "plus all that Congress can delegate." *Id.* at 635. Jurists on the Twelfth and Fourth Circuits have put forward an argument that the Patriot Act has supplanted AUMF when discussing the detention of "terrorist aliens" captured in the United States. *R.* at 39; *Al-Marri*, 534 F.3d at 241; see *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-

56, 115 Stat. 272 § 412 (Patriot Act). This view is based on Supreme Court precedent that dictates "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Al-Marri*, 534 F.3d at 241, quoting *Busic v. United States*, 446 U.S. 398, 406, 100 (1980). Thus, if Congress meant to restrict the President's power with the passage of the Patriot Act then the President's power would be "at its lowest ebb."

However, the Patriot Act is not the "more specific" statute. While the term "terrorist alien" can encompass any terrorist organization, AUMF specifically authorizes the President only to act against organizations who "planned, authorized, committed, or aided" the September 11 attacks. While AUMF's discussion of preventing future attacks might seem expansive, AUMF restricts this mission to only "such" organizations, thereby referring to only organizations involved in September 11. The September 11 attacks were the reason for the authorization of war and therefore Congress created AUMF with a very narrow purpose. On the other hand, the Patriot Act's language of "terrorist aliens" can include terrorists who are not associated with organizations that planned and committed the September 11 attacks. Thus, the Patriot Act is the broader statute aimed at terrorism generally and does not speak to the

President's ongoing authority under AUMF to wage the war against those who attacked us on September 11.

- ii. Congress based the authority in AUMF under the President's power to wage war whereas the Patriot Act speaks to the Take Care Clause of Article II.

In addition to the Patriot Act's broader mission to prevent terrorism as opposed to AUMF's narrow mission to wage war against those responsible for the September 11 attacks, the Patriot Act and AUMF invoke different powers of the President. While AUMF operates under the President's power to wage war as Commander-in-Chief under Article II, section 2, clause 1, the Patriot Act "refers to the Attorney General, the President's agent in implementing the Take Care Clause, and it is found nestled within the immigration code." *Al-Marri*, 534 F.3d at 288 (Williams, C.J., concurring in part and dissenting in part). Thus, Congress created the statutes not to overlap each other but to provide the President with different responsibilities arising from different powers.

III. AHMED RECEIVED SUFFICIENT PROCESS TO SATISFY THE REQUIREMENTS OF THE FIFTH AMENDMENT

A. Ahmed's reliance on the fifth amendment is unsubstantiated.

The fifth amendment of the United States constitution provides a guarantee of rights for individuals residing within the country. It clearly states that no person shall be "deprived of life, liberty or property, without due process of

law." U.S. Const. amend. V. The rationale behind this amendment is the assurance that residents of the United States shall be free from arbitrary government interference in their daily lives. Under the fifth amendment, in order to take action against an individual, the government must provide each individual with due process. The question raised by Petitioner Ahmed is whether the process afforded him to challenge his status as an 'enemy combatant' constitutes due process. Ahmed suggests the government has deprived him of the ability to challenge his designation as an enemy combatant, and his resultant detention does not constitute due process. Ahmed suggests that the government's reliance on the Murphy declaration is inappropriate use of hearsay, and that he hasn't been given a fair chance to rebut the use of such evidence against him. *See generally*, Murphy Decl. August 15, 2004.

B. The *Hamdi* decision in relation to Petitioner Ahmed.

Petitioner Ahmed depends heavily on one particular case to claim that he was denied sufficient process to fight his designation as an enemy combatant, when in fact the district court correctly applied *Hamdi* to the instant facts. *See generally*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). His arguments rely on a comparison between the circumstances of *Hamdi* and those of his own detention under enemy combatant status. Ironically, Ahmed

is more than willing to avail himself of the benefits of United States law both for his immigration status and as an attempt to fight detention. "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." 28 U.S.C.A. § 2241

Petitioner Ahmed makes much of the "minimum requirements of due process" for detention as an enemy combatant in this prior case. *Id.* at 538. He emphasizes the fact that in *Hamdi*, the detainee was apprehended on foreign soil, and that this somehow makes detention less offensive from a civil rights perspective. *Id.* at 520. In taking this position Ahmed misunderstands the reasoning of the *Hamdi* decision. In *Hamdi*, detention was based on the actions and intent of the detained party, not merely the location of the offender. *Id.* at 510. Ahmed makes no distinction between his actions and those of Hamdi that should justify a difference in treatment. Ahmed intimates that he is entitled to more extensive process than the defendant in *Hamdi* with an argument nitpicking about the circumstances of his arrest and detention. *Id.*

In actuality Ahmed may find that he is entitled to less process than that provided to Hamdi. What Ahmed pointedly ignores is that he is a foreign national (a citizen of Pakistan), while Hamdi was in fact a U.S. citizen. *Id.* at 509.

"[D]ue process demands that a **citizen** held in the United States as an enemy combatant be given a meaningful opportunity to content the factual basis for that detention." *Id.* at 520 (emphasis added). *Hamdi's* provisions arguably do not apply to Ahmed, because he is not a citizen. Unlike Hamdi, who was born in the United States (in Louisiana in 1980), Ahmed is merely a legal immigrant. *Id.* at 510. A closer examination of the statute governing habeas proceedings supports a narrower reading of Ahmed's asserted rights. 28 U.S.C. §2214(c).

In *Hamdi*, although there was an arrest on foreign soil, the intent behind the detention and classification as a enemy combatant was the same. *Id.* The detention was intended to prevent a dangerous individual from engaging in future illegal activities. It was justified given the current political climate and military activity. "It is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Id.* at 520. At the time of Ahmed's detention and through the present day, the United States has been engaged in a war on terror, both internationally and domestically.

The nature of the war on terror is analogous to the cold war in that it does not fit the traditional definition of war, but nevertheless creates an environment of active hostility, and one that is recognized by multiple allied countries. "[I]t is a

long-standing principle of international law that officials of foreign governments operating in a country with the consent of its government should be immune from prosecution. But more broadly, Mr. Spataro's extraordinary pursuit of terrorist hunters shows how far we have come since 9/11." *The War Against the War on Terrorism: Italy convicts U.S. spooks for carrying out Italian policy*, The Wall Street Journal, (Nov. 6, 2009). <http://online.wsj.com/article/SB10001424052748704013004574515561500919446.html> (site last visited Jan. 10, 2010).

Ahmed also fails to acknowledge the ongoing, active hostility recognized colloquially by the government as the 'war on terror' as justification for detention on U.S. soil. Whether a suspect involved in this war is apprehended on foreign soil or on domestic soil is completely irrelevant. Currently the United States is actively engaged in a war on terror unrestrained by international boundaries. Detainees like Ahmed participate in activities facilitating terrorism within United States borders, such as creating fraudulent social security cards (which are hard to justify as necessary for a foreign veterinary student). Surely in cases like Ahmed's, where there are multiple charges to support the designation of 'enemy combatant', the government is entitled to a modicum of leeway. It is shortsighted for courts to allow a detail such as location of a terrorist's arrest to thwart effective enforcement of law. "In the ongoing

war with Al Qaeda, America's civic ideals should not frustrate an effective defense." Ruth Wedgwood, *The Rule of Law and the War on Terror*, N.Y. Times, Dec. 23, 2003, <http://www.nytimes.com/2003/12/23/opinion/the-rule-of-law-and-the-war-on-terror.html?pagewanted=1> (site last visited Jan. 10, 2010).

i. The Hamdi requirements.

Hamdi imposes several safeguards to ensure that a detainee receives due process under law. *Hamdi*, 542 U.S. at 533. A detainee must first be given notice of the "factual basis for his classification" as an enemy combatant. *Id.* The detainee must then be provided with a "fair opportunity to rebut the Government's factual assertions" that led to the classification as an enemy combatant. *Id.* Finally, the detainee must be provided with a hearing before a "neutral decisionmaker" to raise any issues regarding his classification and detention. *Id.*

In Ahmed's case, he was provided with the factual basis for his detention, initially as a material witness able to provide the government with information regarding the September 11, 2001 terrorist attacks, and then for creating false Social Security cards and lying to the FBI. The nature of his activities, coupled with his immigration status provides the requisite "factual basis." *Id.* Ahmed knew the reason for his initial

detention and was aware of the charges that resulted in its continuation.

As noted above, *Hamdi* provides for a "fair opportunity to rebut the Government's factual assertions" for **citizens**. *Hamdi*, 542 U.S. at 533 (emphasis added). Ahmed was initially detained in January of 2002, with additional charges brought in November 2002 and January 2003. That provides over a year for him to raise the issue of the accuracy of the government's allegations. The fact that he was denied a pretrial hearing on a motion to exclude evidence after such a lengthy opportunity to raise issues before the court does not constitute a violation of his fifth amendment rights.

The final requirement imposed by *Hamdi*, (that of a hearing before a neutral decisionmaker) is likely Ahmed's strongest argument, but still does show that his fifth amendment rights have been violated. *Id.* He claims that the deprivation of his pretrial hearing violates this portion of the *Hamdi* framework. Ahmed has not challenged the neutrality of the decisionmaker in this instance. He claims deprivation of process, but he had months to raise issues regarding his detention before the court and failed to do so. He hedged his bets and waited until the pretrial hearing. That was his choice, and the court should respect that he elected to forego procedural avenues available to him. He could have filed a motion for reconsideration of his

order of detention, but he chose not to. He cannot now come before this court and suggest that because he failed to pursue all avenues available to him, he has been denied equitable treatment.

In making this argument, Ahmed relies on *Mathews v. Eldridge*, 424 U.S. 319 (1976). He implies that *Mathews* provides him with additional procedural protections, when it clearly focuses the court on a specific set of rights. *Id.* *Mathews* addresses three specific factors: the private interest affected by the official action, the risk of erroneous deprivation of rights, and the probable value of additional safeguards. *Id.* The last portion of the *Mathews* test is where Ahmed fails. He was detained on multiple charges, any additional hearings, pretrial or otherwise, would not have created any additional avenues for him to exercise his perceived rights. The recent decision in *Boumediene v. Bush* regarding the constitutional protections afforded detainees supports the governments position here. *Boumediene v. Bush*, 128 S. Ct. 2229 at 2270 (2008).

C. The Murphy declaration.

In Petitioner Ahmed's case, the district court met the "minimum requirements of due process" as outlined by *Hamdi*, with the admission of the Murphy declaration. *Id.* at 538. The admission of the Murphy declaration gave Ahmed notice of the

facts relied upon to classify him as an enemy combatant. Murphy Decl. August 15, 2004.

From those facts he was entitled to object to his classification and was armed with the information necessary to do so. Ahmed argues that *Hamdi* gives him the right to have only the "most reliable evidence" presented to confirm his status as an enemy combatant. *Hamdi*, 542 U.S. at 534. However, Ahmed neglects the position taken by the court in *Hamdi*, that the government may meet its factual burden with the statement of a knowledgeable affiant summarizing the basis of the enemy combatant's detention. *Id.*

In Ahmed's case, the Murphy declaration is both detailed and reliable as evidence against Ahmed. *See generally*, Murphy Decl. August 15, 2004. It does not depend solely upon the information of the declarant John R. Murphy. It includes his understanding of facts privy to other government and private actors. For example, Murphy refers to Ahmed's date of entry into the U.S., the analysis of his laptop computer and his telephone records. *Id.* Each of these facts was disclosed in the declaration and may be independently confirmed by Ahmed's attorney. It is not unduly burdensome to require that a detainee address the factual basis for his detention before challenging their status.

CONCLUSION

For the preceding reasons, Respondent respectfully requests this honorable court affirm the en banc judgment of the United States Court of Appeals for the Twelfth Circuit as to Petitioner's designation as an enemy combatant and reverse their ruling as to the sufficiency of process afforded to Petitioner under the Fifth Amendment.

Respectfully submitted,

The United States of America

By their attorneys

Team: 6147