

No. 08-11144

IN THE SUPREME COURT OF THE UNITED STATES

BURHAN UDDIN AHMED,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE 12TH
CIRCUIT

Brief for the Respondent Team Number 6432

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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CASES CITED BELOW

The opinion for the Appeals court is unpublished. Ahmed v. United States, No. 06-9701 at *25 (12th Cir. Nov. 24, 2008).

The opinion of the United States District court of the District of East Dakota is unpublished.

JURISDICTIONAL STATEMENT

Appellant Burhan Uddin Ahmed invoked the jurisdiction of the district court by filing a petition for a writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241 to secure his release from military detention. The district court dismissed Ahmed's petition and he filed his appeal in the United States Court of Appeals for the Twelfth Circuit. The court of appeals reversed the judgment of the district court and remanded the case. The case was granted certiorari and is scheduled for oral argument.

STATEMENT OF THE CASE

Ahmed, a citizen of Pakistan, legally entered the United States with his family on September 8, 2001, to obtain a doctor of veterinary medicine degree at Wilson University in Wilson, East Dakota. On January 3, 2002, Ahmed was taken into custody by federal authorities, as a material witness in the government's investigation of the September 11 attacks. Ahmed, No. 06-9701 at *7 He was detained in Wilson. Id. He was charged in November

2002 in the District of East Dakota with the possession of counterfeit Social Security cards and with the intent to defraud. Id. In January 2003, he was charged with making a false statement to the FBI. Id. The district court set a July 17, 2003 trial date. On June 9, 2003, the court scheduled a hearing for June 15, 2003. Id. On all pretrial motions, including a motion to suppress evidence that Ahmed asserted was obtained by torture. On June 13, 2003 the government filed an ex parte motion to dismiss the indictment based on an order signed by the President of the United States. Id.

The President drafted an order in which he determined that" Ahmed: (1) is an enemy combatant; (2) closely associated with al Qaeda; (3) "engaged in conduct that constituted hostile and warlike 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." Id. The President declared that Ahmed's detention by the military was "necessary to prevent him from aiding al Qaeda." Id. The President ordered the Attorney General to surrender Ahmed to the Secretary of Defense to "detain him as an enemy combatant." Id. The District of East Dakota granted the government's motion to dismiss the

criminal charges against Ahmed, who was then taken into military custody at the Army Regional Consolidated Detention Facility in Souda, East Dakota, where he has since been detained. Id. at 8. Ahmed's counsel filed a petition for a writ of habeas corpus on his behalf in the United States District Court of East Dakota. Id. Ahmed asserted in his petition that his detention as an enemy combatant was unlawful and that the government must file criminal charges against him or release him. Id. The court found that Ahmed could be detained as an enemy combatant, but found that he was entitled to challenge the factual basis of his detention at a hearing consistent with his procedural due process rights. Id. at 9. The district court sent the case to a magistrate judge to determine the process that Ahmed must be afforded. Id. The magistrate recommended that Ahmed's petition for a writ of habeas corpus be dismissed based on his refusal to present evidence in his defense. Id. The district court followed the magistrate's recommendation and dismissed Ahmed's petition. Id. at 10. Ahmed then appealed to the United States court of Appeals for the Twelfth circuit. A panel affirmed the district court's dismissal. Id. During Ahmed's motion for rehearing the court voted to vacate the panel opinion and hear the case en banc. Id. The appeals court reversed the judgment of the district court on the issue of whether Ahmed had been afforded

sufficient due process to challenge his designation as an enemy combatant. Id. at 28. The court then remanded the matter to the district court. Id. Ahmed in response petitioned for a writ of certiorari to the Supreme Court. Certiorari was granted and the case is now scheduled for oral argument.

STATEMENT OF FACTS

I. Congress passed the Authorization for Use of Military Force (AUMF) in response to September 11th.

On September 11, 2001, Al Qaeda members hijacked commercial airplanes and used them as weapons in the most deadly attack on the United States in the Nation's history. In response to the attacks, one week later, Congress enacted the AUMF, which provides support for the President's use of "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...in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The AUMF grants the president with the "authority under the Constitution to deter and prevent acts of international terrorism against the United States", in order to specifically

address and prevent forces responsible for the September 11 attacks [to] "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." The armed conflict has resulted in the capture and detention of many people associated with al Qaeda whom the President has determined are enemy combatants. Ahmed has been classed as one of those enemy combatants.

II. The Factual Basis for Ahmed's Military Detention

Ahmed is a citizen of Pakistan who arrived in the United States on September 8, 2001. Ahmed, No. 06-9701, at *47. The President, as commander in chief made a formal declaration on June 13, 2003 that Ahmed is an enemy combatant based on intelligence gathered and analyzed by several executive branch agencies. Id. According to the Declaration of John R. Murphy, it is known that Ahmed has ties to prominent figures in al Qaeda such as Osama Bin Laden and Khalid Sheikh Muhammad. Id. Ahmed attended an al Qaeda run terrorist training camp in Afghanistan for 18 months between 1996 and 1998. Id. Ahmed was sent to the United States as a sleeper agent and was instructed to investigate the plausibility of hacking into computer systems of

the Social Security administration to create chaos in the United States' social safety net in order to secure revenue for future terrorist acts. Ahmed enrolled in the veterinary medicine program at Wilson University in Wilson East Dakota he was in failing status at the university due to his constant absenteeism. Ahmed acted as a contact point for al Qaeda operatives newly arriving in the United States. Id.

Consequently, there is significant evidence that Ahmed is an al Qaeda sleeper agent who was sent to the United States for the purpose of engaging in terrorist activities and that he should be detained to prevent him from aiding al Qaeda in its efforts to attack the United States and its citizens.

SUMMARY OF THE ARGUMENT

I. The appeals court properly ruled that the AUMF grants the President with the authority to detain Ahmed.

A. The President has Constitutional and Statutory authorization to detain enemy combatants. The President's authority to detain enemy combatants during the conflict with al Qaeda has been widely accepted and recognized by the Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507 (2004) and the fourth circuit in Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). Those cases establish the clear finding that Congress, in passing the AUMF one week after September 11 granted the

President's use of all "necessary and appropriate force," including detention of enemy combatants, in order to "protect United States citizens both at home and abroad" from "future acts of international terrorism against the United States." 115 Stat. 224. The Supreme Court and the Fourth circuit's rulings in Hamdi and Padilla logically allow this Court to decide that the President is authorized to detain Ahmed as an enemy combatant. Like Hamdi and Padilla, U.S. citizens with ties to al Qaeda who the court found to be rightfully detained under the AUMF, Ahmed, a legal resident alien who associated with al Qaeda, should similarly be detained.

B. The court should find that the AUMF is applicable to al Qaeda because Congress intended to it to reach operatives, like Ahmed who are associated with al Qaeda.

C. Article II of the Constitution gives The President the authority to use his powers as Commander in Chief to detain enemy combatants, since military detention is a necessary consequence of preventing further acts of terror.

D. Ahmed is an enemy combatant because of his ties to al Qaeda and because if he were not detained, it is possible that he will take part in acts of terrorism against the United States. Ahmed, a citizen of Pakistan allied himself with al Qaeda, received funding and training from al Qaeda, and traveled

to the United States on orders from al Qaeda to serve as a sleeper agent to attack the United States from within the country. Codes of war and case law most notably Ex parte Quirin, 317 U.S. 1, 38 (1942) states that aliens who "associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil" are enemy combatants.

II. The Appeals court improperly decided to remand the case on the issue of Ahmed's due process rights. Ahmed was afforded sufficient due process under Hamdi. Also, under Eisentrager, Ahmed, as a resident alien, is not required to have more due process rights than Hamdi.

A. Ahmed, as a resident alien, is not required greater due process than Hamdi as stated in Johnson v. Eisentrager, 339 U.S. 763(1950). In Eisentrager the court stated that while an alien residing within the United States is afforded the Fifth Amendment right to due process, that alien can be summarily arrested, detained or deported where the war has been declared against their country. Ahmed is accused of associating with an organization that the United States has declared war against, as such, he is only entitled to minimal due process.

B. The court in Hamdi determined the appropriate level process due a detainee by balancing the detainee's liberty

interest versus the interests of the Government: (1) military engaged in waging war should not be distracted by litigation; (2) intrusion into the sensitive secrets of national defense and; (3) the impracticality of recovering evidence from the battlefield. Ahmed's liberty interest is at most equal to that of Hamdi. As in Hamdi, the evidence that makes Ahmed an enemy combatant is located on a foreign battle where American soldiers are at risk. More process would reveal important national secrets necessary to combat Al Qaeda.

ARGUMENT

I. THE PRESIDENT IS AUTHORIZED TO DETAIN AHMED AS AN ENEMY COMBATANT

The circuit court rightly decided that the President has the legal authority to detain Ahmed as an enemy combatant in the conflict with al Qaeda even though Ahmed had legally entered the United States and was living there when he was detained. Ahmed asserted that the President lacked legal authority under both the AUMF and the Constitution, to designate and detain him as an enemy combatant because he was lawfully residing in the United States and was due the right to full criminal process because he had achieved civilian status. Ahmed v. United States, No. 06-9701, at *10. In response, the court found that both the AUMF and the Constitution allow for Ahmed's detention.

A. The Executive has Power to Detain Enemy Combatants

In response to the terrorist acts on the United States that occurred on September 11, 2001 Congress passed the AUMF, which was enacted, "to protect United States citizen's both at home and abroad, " The AUMF authorized the President's use of "all necessary and appropriate force against the nations and organizations that planned, authorized and committed, or aided the 9/11 attacks, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the Unites States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The Constitution ensures that all persons detained by the government the right to be charged and tried and prohibits the government from detaining individuals unless there is authorization for their detention. See, United States v. Salerno, 481 U.S. 739, 755 (1987). One of these major exceptions to military detention is the detention of enemy combatants incident to a grant from Congress or during war times. The court in Hamdi found that when a person is properly designated as an enemy combatant by the President that the person may be detained without charge or criminal proceedings "for the duration of the relevant hostilities." Hamdi, 542 U.S. 507 at 516.

The Court in Hamdi establishes for its own use that the definition of an enemy combatant is, an individual "who is part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States." Hamdi, 542 U.S.507 at 516. The Hamdi Court validated, as constitutional and within the authority of the AUMF, the detention of a United States citizen who "was part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who engaged in an armed conflict against the United States' there." Id. The Padilla court found that an individual who was "closely associated with al Qaeda" and was "seized on American soil" "unquestionably qualified as an 'enemy combatant' " because he had "taken] up arms on behalf of [al Qaeda]" and had thereafter "crossed our borders with the avowed purpose of attacking this country and its citizens from within [like the] persons who committed the atrocities of September 11." Padilla, 432 F.3d 582 at 586.

Both Hamdi and Padilla, find that the AUMF gave the President the authority to detain enemy combatants during the current conflict. Ahmed denied being an enemy combatant and asserted that the President lacked authority to detain him, because he was taken into custody in the United States, where he

had achieved civilian status with its rights to full criminal process. Although Ahmed, unlike Hamdi and Padilla did not engage in active combat on a battlefield, he may still be captured and detained because the rulings from Hamdi, Padilla and Quirin stand for the principle that enemy combatants may be captured and detained in the United States when the person enters the United States with "hostile purpose" to attack the country from within. Ahmed, No. 06-9701 at *16. As the appeals court in Ahmed's case made clear, the President is authorized to detain enemy combatants who have taken up arms in support of a country of government that is our enemy. Id. At 13 Furthermore, the court states that the AUMF plainly authorizes the President to use all necessary and appropriate force against al Qaeda which "must include the detention of al Qaeda operatives who associate with the enemy- whether it is the al Qaeda organization or the Taliban government- because these operatives with "aid, guidance and direction enter this country bent on hostile acts. Id. At 16 (citing Quirin, 317 US at 38).

Ahmed's position that the President has no authority to detain him under the AUMF relies on the assumption that when Congress passed the AUMF in response to the September 11 attacks that Congress only intended it to extend to people classed in the same category as the September 11 hijackers, none of whom

took part in combat against the United States on a foreign battlefield. Additionally, if Ahmed's argument was accepted, the President would have no authority to use of military force in situations where trained al Qaeda agents have successfully crossed our borders and are preparing to carry out an act of war against our citizens on al Qaeda's behalf. Congress made it clear in their decision to pass the AUMF, that it authorized the use of "all necessary and appropriate force" against aliens who have come to the United States to take an active part in al Qaeda terror operations. 115 Stat. 224. The AUMF emphasizes that it is "necessary and appropriate to protect United States citizens" because the individuals and groups responsible for the "acts of treacherous violence" that were committed on September 11 "continue to pose an unusual and extraordinary threat to the national security." Id. The people who executed the September 11th attacks were aliens who entered the United States to carry out al Qaeda orders. It was in response to the attacks that Congress approved the AUMF and for that reason that the President has the authority to use the AUMF against Ahmed.

As recognized by Padilla, Congress' rationale for passing the AUMF further confirms that its enemy combatant detention authority reaches aliens who "associated with the military arm of the enemy, and with its aid, guidance, and direction entered

this country bent on committing hostile acts on American soil.” Padilla, 423 F.3d at 392 (citing Quirin, 317 U.S. at 37-38). In Quirin, the Supreme Court recognized that the “universal agreement and practice” among nations is that enemy combatants are “subject to capture and detention [during wartime],” 317 U.S. 1 at 30-31, and rejected any suggestion that the detainees were “any less belligerents if, as they argue, they have not actually entered the theatre or zone of active military operations,” *id.* at 38. The “enemy belligerents” in Quirin had been trained near Berlin, Germany in the use of explosives and then traveled to the United States with funding from the German High Command “to destroy war industries and war facilities in the United States.” *Id.* at 21. The men buried their uniforms after arriving in the United States and dressed in civilian clothing when travelling to New York and Chicago, where they were arrested. *Id.* The court in Quirin found that their attempt to look like civilians gave them “the status of unlawful combatants”—it was by posing as civilians that they intended to maintain their cover in the United States until they were able to “commi[t] hostile acts involving destruction of life or property.” *Id.* at 35. Thus, the court concluded, that it was “without significance that [they] were not alleged to have borne conventional weapons or that their proposed hostile acts did not

necessarily contemplate collision with the Armed Forces of the United States.” Id. at 37. The saboteurs had “passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose” and had “remained upon our territory in time of war” seeking to commit “hostile acts” against the country. Id. at 37-38. Like Quirin, Ahmed passed through our lines in civilian dress under the guise of being a medical student and through his training and association with al Qaeda should be defined as an enemy combatant and detained.

Although the AUMF does not speak specifically to detention it is implied and the AUMF includes the authority to detain for the duration of the relevant conflict. The detention of alien enemy combatants is and has been a common incident of warfare and has been used to prevent alien combatants, like Ahmed from continuing to prepare their terrorist plots. Military detention is necessary to “prevent captured individuals from returning to the field of battle and taking up arms once again.” Hamdi, 542 U.S. at 518. Detention is such “a fundamental incident of waging war” under “longstanding law-of-war principles” that the Hamdi plurality found that although the AUMF does not specifically use language of detention that the authority to detain is implied in the language of the statute, “Congress’

grant of authority for the use of 'necessary and appropriate force' [in the AUMF] include[s] the authority to detain for the duration of the relevant conflict." Id. at 587. Both Hamdi and Padilla affirm that the AUMF constitutionally provided the President authority to detain enemy combatants for the duration of the current conflict. See also, Ex Parte Quirin 63 S. Ct. 2 at 28 (where the court states that the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. See, Johnson v. Eisentrager, 339 U.S. 764, 786 (1950) ("This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over ... enemy belligerents [and] prisoners of war.'" Duncan v. Kahanamoku, 327 U.S. 304, 774 (1946) articulates that the authority is especially clear where the combatant is an alien, "Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security"); Ludecke v. Watkins, 335 U.S. 160, 173 (1948) (finding that the President is "entrusted ...with the disposition of alien enemies during a state of war").

The AUMF does not require a "clear statement" to authorize detention of enemy combatants arrested in the United States. There is no need to impose a rule that would require a "clear

congressional statement" before the government could "arrest and detain as 'enemy combatants' aliens lawfully residing in the United States. The Supreme Court in Hamdi, declined to adopt such a clear-statement rule and the court in Padilla found that there is no "clear statement rule" and also that, even if there were, "the AUMF constitutes such a clear statement," Padilla, 423 F.3d at 395-396, even in the case of a citizen combatant detained in the United States. Even if Ahmed challenged the lack of detention specific language in the AUMF, there is no basis for requiring a clearer statement for the detention of aliens than citizens since AUMF provides the requisite clarity. See Hamdi, 542 U.S. at 516-517; Padilla, 423 F.3d at 396.

The PATRIOT Act and federal criminal statutes do not limit the detention authority of the AUMF. Ahmed cannot gain support from the fact that the PATRIOT Act and federal criminal laws separately authorize limited detentions for reasons unrelated to whether an individual is an "enemy combatant." The PATRIOT Act's detention provisions authorize the Attorney General to detain, pending removal proceedings or criminal prosecution, resident aliens suspected of terrorist activity, espionage, illegal export, or "any other activity that endangers the national security," without regard to whether the alien is associated with al Qaeda or whether there is an armed conflict. 8 U.S.C. §

1226a(a) (2001). The AUMF authorizes the President to order alien enemy combatants to be detained in military custody during the armed conflict with al Qaeda. Ahmed, even if he wanted to cannot assert that the PATRIOT Act's specific detention provisions "trump" the AUMF's general detention authority because the two provisions relate to two separate types of detention and two separate groups of individuals.

B. Applicability of The AUMF to al Qaeda

The circuit court properly concluded that the President's authority to detain under the AUMF extends to Ahmed, a member of al Qaeda. Even though Ahmed did not take up arms against the United States his detention is warranted because following the circuit court's decision, "there is no question that persons associated with al Qaeda, the organization known to have carried out the 9/11 attacks against the United States who were sent here as sleeper agents and terrorist operatives charged with committing additional attacks upon our homeland "are individuals Congress sought to target in passing the AUMF." Ahmed, No. 06-9701, at *14; Hamdi, 542 U.S. at 518. Additionally the court emphasized the AUMF extends to al Qaeda since the statutory language of " all necessary and appropriate force against the nations and organizations that planned, authorized, committed or aided the 9/11 attacks shows Congress clear intent to authorize

military retaliation against a "reigning foreign government known to have supported the enemy force that attacked the United States as well as military action against al Qaeda operative who like the 9/11 hijackers, were sent by the al Qaeda organization to the United States to conduct terror operations here. Ahmed, No. 06-9701, at *14

Ahmed raised the argument that the AUMF does not authorize the executive to deal militarily with al Qaeda. Ahmed, at *15. The court determined that the 9/11 hijackers are similarly situated to Ahmed since like Ahmed, the attackers came into the US under false pretenses to carry out al Qaeda orders. Like Ahmed they too did not engage in combat against the US on a foreign battlefield. Id. at 14. The court properly found that there is nothing in the language of the AUMF that limits the President from detaining "al Qaeda operatives similarly situated to the 9/11 hijackers." Id. at 15. Ahmed also argued that the AUMF did not apply to al Qaeda since it is not a nation state or an enemy government. The circuit court disagreed with Ahmed's argument stating that although al Qaeda may be an unconventional enemy force, that it is still an enemy force, that allows the President to use force to prevent their further acts of terror on the United States.

Padilla finds that The AUMF does apply to al Qaeda, "al Qaeda is an entity with which the United States is at war." Padilla, 423 F. 3d at 389. Hamdi also highlights the fact that we are fighting an enemy that has declared war on us. Hamdi, 296. F.3d 278, 283. Because of the circumstances of our hostile relations with al Qaeda the president's authority to detain enemy combatants that ally themselves with al Qaeda should not be limited to enemy governments or formal military arms. Following the decision of the Appeals court, this court should find that the AUMF authorizes the President to use all appropriate and necessary force against al Qaeda including the detention of al Qaeda operatives who associate with the enemy since these operatives come into the country to further prosecute the war.

Additionally, Ahmed attempts to use Ex Parte Milligan, 71 U.S. 2 (1866) to support his argument that he should be tried in a civilian court instead of detained. Milligan, who was detained along with four other members of a secret organization for planning to steal weapons to help the Confederacy, where the court found that they should be tried in civilian courts rather than military tribunals, does not apply to Ahmed. Congress never authorized the use of force against Milligan's organization, thus preventing Milligan from being detained. Unlike Milligan's group, the use of force has been authorized

for al Qaeda in the form of the AUMF. Additionally, the appeals court noted that Milligan unlike, Ahmed could not be classified as an enemy combatant since there had been no statutory authorization enacted to give the Executive the authority to detain Milligan and his accomplices Ahmed, No. 06-9701 at *17.

C. The President has Inherent Constitutional Power

Article II of the Constitution is where the Executive derives his authority. Article two section two, clause one provides that the President is the Commander in Chief of the Army and Navy. U.S. Const. Art. II section 2, cl 1. This clause gives the President war making powers that include the authority to capture and detain individuals who are involved in acts of hostility against the United States. The court in Harisiades v. Shaughnessy, 342 U.S. 580, 588-9 (1952), states that where the detained enemy is an alien, the President's inherent constitutional authority as Commander in chief is at its peak because the President may act in national security foreign policy and military affairs. "Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches

of government as to be largely immune from judicial inquiry or inference. Id.

It was the intent of the framers that there be a balancing of power between the three branches of government to prevent unrestrained violation of any branches constitutional powers. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) provides the analytic model for examining the scope of executive powers. Justice Jackson's enduring tripartite test shows that when the Executive acts pursuant to an express or implied act of Congress his authority is at its maximum. Following that reasoning, the President has the constitutional authority to detain based on Congress granting him the use of the AUMF. That same clause also gives the President war making powers which include the authority to capture and detain individuals involved in hostilities against the United States. See Quirin, 317 U.S. at 26.

Ahmed argues that the President lacks inherent constitutional power to detain him. Ahmed, No. 06-907, at *10. The Constitution provides that the President is the Commander in Chief of the Army and Navy, U.S. Const. Art. II, § 2, cl. 1, and gives the President war-making powers which include the authority to capture and detain individuals involved in hostilities against the United States. See Quirin, 317 U.S. at

25-26; Hamdi ,296 F.3d 278, 281-282 (4th Cir. 2002) see also, Hamdi v. Rumsfeld, 316 F.3d 450,463 (4th Cir. 2003) (the war powers of "the President, as Commander-in-Chief, include the authority to detain those captured in armed struggle and likewise extend to the executive's decision to...detain alien enemies during the duration of hostilities"). The Constitution provides an independent and sufficient basis to authorize Ahmed's wartime detention following the decision in Quirin and Hamdi because Ahmed is an alien citizen in a time of hostilities between the United States and terrorist organizations.

The President's broad authority as Commander in Chief over enemy aliens is not limited to circumstances in which the combatant is captured on a foreign battlefield. In Quirin, the Supreme Court recognized that "entry 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 used or useful in prosecuting the war, is a hostile and war-like act," Quirin, 317 U.S. at 36-37. Following this line of reasoning, the President has authority to detain Ahmed based on his relationship with al Qaeda as a sleeper agent and point person for newly arrived operatives? Ahmed, No. 06-9701 at *47.

D. Designation of Ahmed as an Enemy Combatant

Following the decisions in Hamdi and Padilla logically leads to the determination that Ahmed's designation as an enemy combatant is authorized by Congress and is constitutional. The Supreme Court in Hamdi and the fourth circuit in Padilla recognize the authority that Congress granted to the President to designate enemy combatants during the continuing conflict with al Qaeda. Hamdi, 542 U.S. 516; Padilla, 423 F. 3d at 390. The court in Hamdi found that Hamdi supported forces that were hostile to the United States and because of his interaction with the Taliban, an enemy force that is hostile to the U.S. that he clearly fell within the legal category of an enemy combatant. Hamdi, 542 U.S. 507 at 516. The court in Padilla, found that the AUMF was broad enough to authorize Padilla's designation and his detention since it was found that Padilla, an American citizen was closely associated with al Qaeda and took up arms to continue the battle in the United States. Padilla, 423 F. 3d 386 at 389. Padilla, accepted the Quirin definition of enemy belligerent and held that Padilla was properly classed as an enemy belligerent and an enemy combatant from Hamdi. Id. At 392 Taking the definition of enemy combatant from Hamdi, Quirin, and Padilla, Ahmed should be classed as an enemy combatant because he has supported and been supported by al Qaeda, who is a force that is hostile to the United States. Because Ahmed supports al

Qaeda and because he was planning to commit acts that would thwart our national security, the President has the authority to detain him in order to prevent acts of terror inside the United States pursuant to Congress' grant of power under the AUMF.

The fact that Ahmed was captured in the United States should not prevent him from being classed as an enemy combatant. Enemy combatants pose the same threat of returning to the battlefield when captured in the United States as they would if captured overseas. The risk of returning to the battlefield in the current conflict is especially pronounced given al Qaeda's persistent efforts to move the fight to the United States. Although Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 120-121 (1866), states that the "Constitution covers with the shield of its protection all classes of men, at all times, and under all circumstances." Ahmed cannot argue that the locus of capture in the United States requires that he be given "the same right to be charged and tried as all citizens arrested in the United States because the Supreme Court has held that Milligan does not apply to enemy combatant challenges. Padilla, 423 F.3d at 396-397; see Hamdi, 542 U.S. at 523 (Quirin "both postdates and clarifies Milligan," providing "the most apposite precedent" for enemy combatant challenges). Additionally, it is well established that aliens are entitled to lesser constitutional

protections than those afforded citizens, see, e.g., Hamdi, 542 U.S. at 559. The AUMF provides no indication that Congress intended to diverge from the "universal practice" of detaining alien enemy combatants who have entered the country "bent on committing hostile acts on American soil." Padilla, 423 F.3d at 392; see Quirin, 317 U.S. at 37-38. Congresses rationale for passing the AUMF would make it absurd for the President to have the authority to classify Padilla and Hamdi but not Ahmed. Additionally, though Ahmed was arrested inside the United States, his classification as an enemy combatant is still constitutional and authorized by the AUMF, because he entered the country with training, funding, and orders from al Qaeda to facilitate and conduct terrorist activities. Ahmed, No. 06-9701 at *47.

II. THE CIRCUIT COURT INCORRECTLY APPLIED THE HAMDI FRAMEWORK OF DUE PROCESS TO THE CASE AGAINST AHMED

Ahmed is not entitled to more process than what was outlined in Hamdi, 542 U.S. at 533. The process used in Hamdi was formulated specifically for citizen-detainees and not for resident aliens. Id.

As an alien and alleged member of an organization that the United States has declared war against, Ahmed's due process rights are substantially less than that of a U.S. citizen. Eisentrager, 339 U.S. at 775. Even assuming that Ahmed is due the same process as a U.S. citizen, he would be entitled to the same process as Hamdi. While Ahmed was captured within the United States the evidence making him an

enemy combatant exists outside the United States subject to the same considerations as articulated in Hamdi.

A. AHMED SHOULD NOT BE GIVEN THE SAME DUE PROCESS AS HAMDI BECAUSE HE IS AN ALIEN AND ASSOCIATED WITH AN ENEMY OF THE UNITED STATES

A detainee must be a citizen of the United States in order to invoke the due process framework articulated in Hamdi. The framework the Court developed states that "a citizen-detainee...must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi, 542 U.S. at 533.

The Court has traditionally extended to resident aliens the same due process rights as those afforded to citizens by the Constitution. Yick Wo v. Hopkins, 118 U.S. 356 (1886). However, the court has pointed out that war significantly reduces the rights of aliens. Ex parte Kumezo Kawato, 317 U.S. 69, 75 (1942) ("The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy"). Later in defining the rights due to an alien who is associated with an enemy of the United States the Court has said, "The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists." Eisentrager, 339 U.S. at 775. The Court stated "in war every individual of the one nation must acknowledge every individual of the other nation as his own enemy- because the enemy of his country." (internal quotation marks omitted)

Eisentrager 339 U.S. at 773. The Court went on to define the process due an alien that disputes their detention as "only to ascertain the existence of a state of war and whether he is an alien enemy." Id.

Not only was Ahmed provided with the opportunity to present facts that he fell outside the definition of an enemy alien, as required by Eisentrager, but also the further protection of notice of the government's allegations that he was an enemy combatant and an opportunity to rebut them. Here the government has detained Ahmed under the belief that he was an alien and that he closely associated himself with Al Qaeda. Ahmed No. 06-9701 at *47-48. The government provided Ahmed with notice of the allegations against him and he was given the opportunity to dispute the allegations in front of a neutral decision maker.

B. IF AHMED DID HAVE THE SAME RIGHT TO DUE PROCESS AS A CITIZEN THEY WOULD BE THE SAME AS HAMDI

Where a detainee has standing to challenge his detainment as a citizen, the court must decide whether the circumstances of the case warrant greater procedural protections than those articulated in Hamdi using the balancing test articulated in Mathews, 424 U.S. at 335. The test articulated in Mathews identified three factors to be considered in a due process analysis: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the burdens that the additional or substitute procedures would entail.

In Hamdi, the Court found that the interests of the Government and the detainee were both substantial and stated that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi 542 U.S. at 532-534.

1. THE PARTIES' RESPECTIVE INTERESTS ARE THE SAME AS THOSE IN HAMDI

The Circuit Court recognized Ahmed's private interest in being free from indefinite detention as indistinguishable from the private interest asserted by Hamdi. Ahmed No. 06-9701 at *25; see also Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"). The Circuit Court then incorrectly states that "the government be required to demonstrate why any limitation placed on the normal habeas procedures would be necessary." Ahmed No. 06-9701 at *26. The Court in Hamdi did state that the Government's asserted interest "in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict" does not trump a citizen's right to liberty. Hamdi 542 U.S. at 530. The Court also recognized that it is not in the best position to second guess the executive's interests in matters of war. Id. See also Department of Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). The Court in Hamdi

resolves this contradiction by stating "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." Hamdi 542 U.S. at 534. The Supreme Court did not intend for courts to engage into an inquiry of the Government's asserted interests until the detainee has presented reliable evidence rebutting those assertions. Ahmed failed to present any evidence at all to rebut the Government's asserted interests. Emphasizing this point is the decision in Padilla, 423 F.3d at 395 ("To subject to such exacting scrutiny the President's determination that criminal prosecution would not adequately protect the Nation's security at a very minimum fails to accord the President the deference that is his when he acts pursuant to a broad delegation of authority from Congress, such as the AUMF").

2. THE RISK OF ERRONEOUS DEPRIVATION OF LIBERTY IS THE SAME AS IN HAMDI

The Circuit Court then moves on to the circumstances surrounding Ahmed's capture, reasoning that because he was captured within the United States "unarmed and in the presence of his family" that the burden on the Government of producing evidence was less than in Hamdi and there was a greater "risk of improperly depriving Ahmed of his interest in his liberty without due process." Ahmed No. 06-9701 at *27. The Circuit Court has mistakenly focused their attention on the location of Ahmed's capture, while the Hamdi court focused on the location of the evidence making the detainee an enemy combatant. The Hamdi Court stated that it is limited to determining the process

necessary to find that a person is an enemy combatant. The court is limited to "inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States." Hamdi 542 U.S. at 535. A person becomes an enemy combatant if they are "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States" (internal quotation marks omitted) Id. at 516. see Quirin 317 U.S. at 37-38 ("citizens who associate themselves with the military arm of the enemy government... are enemy belligerents").

The evidence of Ahmed's association with Al Qaeda exists on the battlefield and process akin to a trial would be a distraction for U.S. servicemen and may expose sensitive national secrets. The Murphy declaration alleges that Ahmed was trained by Al Qaeda in Afghanistan and that he met with senior Al Qaeda officials in preparation for his infiltration of the United States. Ahmed No. 06-9701 at *47. These actions are indistinguishable from other enemy combatants who received the same or less due process than Ahmed. Quirin 317 U.S. at 21 ("After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing"); see also Hamdi 542 U.S. at 512-513 ("Hamdi "traveled to Afghanistan in July or August 2001, and that he thereafter affiliated with a Taliban military unit and received weapons training") (internal quotation marks omitted); see also Padilla

423 F.3d at 389-390 ("Al Qaeda operatives recruited Jose Padilla. . . in Afghanistan. . . Padilla met with al Qaeda operatives in Afghanistan, received explosives training in an al Qaeda-affiliated camp"). This analysis of precedent is further supported by the Court in Milligan which said that Milligan was not entitled to the status of a prisoner of war because he had not "conspired with bad men to assist the enemy" and "he was not engaged in legal acts of hostility against the government." Milligan 71 U.S. 2 at 131.

Though the government has made assertions that Ahmed associated with the enemy while within the United States, the ruling of Circuit Court ignores the fact that Ahmed became an enemy combatant in Afghanistan. The Supreme Court has stated that acts of hostility by the detainee that occur with the United States are not necessary to determine their enemy combatant status. Quirin, 317 U.S. at 38. (Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation").

CONCLUSION

Following oral argument the Court should find that both the AUMF and the Constitution authorize the seizure and indefinite military detention of Ahmed based on his relationship with al Qaeda and his role in planning future attacks. Additionally, the court should find that Ahmed was given sufficient process and dismiss Ahmed's petition for a writ of habeas corpus.