

No. 08-11144

---

---

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

---

BURHAN UDDIN AHMED,  
Petitioner

v.

UNITED STATES,  
Respondent

---

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

---

**BRIEF FOR THE RESPONDENT**

---

TEAM NUMBER 6834  
Assistant Solicitor General  
Counsel of Record

---

---

## **QUESTIONS PRESENTED**

1. Whether the President has the authority, under the Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), or alternatively under the Constitution, to seize and detain, during ongoing hostilities, a person who conspired with al Qaeda to commit terrorist atrocities in the United States?
2. Whether the procedures that the district court employed to allow a detainee to challenge his enemy combatant status were sufficient under the due process requirements of the Fifth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... vi

CONSTITUTIONAL AND STATUTORY PROVISIONS ..... vi

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 4

ARGUMENT ..... 6

    I. THE PRESIDENT HAS THE AUTHORITY TO DETAIN AHMED AS AN ENEMY  
    COMBATANT..... 6

        A. The AUMF Authorizes the President to Detain Enemy  
        Combatants ..... 6

            1. Ahmed Is an Enemy Combatant Within the "Narrow Category"  
            Articulated in Hamdi ..... 8

            2. Ahmed Is an Enemy Combatant Under the Permissible Bounds  
            of this Court's Precedent ..... 10

        C. The Constitution Inherently Authorizes the President to  
        Detain Ahmed as an Enemy Combatant ..... 14

            1. The AUMF Authorized War and Engaged the President's War  
            Powers to Detain Enemy Combatants Under Article II of the  
            Constitution ..... 14

            2. The Patriot Act Does Not Limit the President's War Powers  
            ..... 16

    II. AHMED RECEIVED THE PROCESS THAT HE IS DUE UNDER THE FIFTH  
    AMENDMENT..... 17

        A. The Hamdi Plurality Applied the Mathews Balancing Test and  
        Stated the Minimum Requirements for Due Process in Enemy  
        Combatant Proceedings. .... 18

        B. The District Court Followed Hamdi's Due Process Inquiry  
        and Satisfied the Fifth Amendment ..... 22

        C. Ahmed is Not Entitled to More Process than Hamdi Received  
        ..... 27

CONCLUSION ..... 30

**TABLE OF AUTHORITIES**

**Cases:**

Addington v. Texas, 441 U.S. 418 (1979) ..... 21

Al-Marri v. Pucciarelli, 534 F.3d 213  
(4<sup>th</sup> Cir. 2008) ..... 11,23,24,29

Aptheker v. Secretary of State,  
378 U.S. 500 (1964) ..... 4

Boumediene v. Bush, 128 S.Ct. 2229 (2008) ..... *passim*

Basic v. United States, 446 U.S. 398 (1980) ..... 17

Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.,  
333 U.S. 103 (1948) ..... 14

Cleveland v. Bd. Of Educ. v. Loudermill, 470 U.S. 532  
(1985) ..... 19

Dames & Moore v. Regan, 453 U.S. 654 (1981) ..... 16

Edmond v. United States, 520 U.S. 651 (1997) ..... 17

Ex Parte Milligan, 71 U.S. 2 (1866) ..... 12,13,14,17

Ex Parte Quirin, 317 U.S. 1 (1942) ..... *passim*

Garlotte v. Fordice, 515 U.S. 39 (1995) ..... 24

Haig v. Agee, 453 U.S. 280 (1984) ..... 4

Hamdan v. Rumsfeld, 548 U.S. 557(2006) ..... 1,15

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ..... *passim*

Kansas v. Hendricks, 521 U.S. 346 (1997) ..... 22

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... 20,21

Medina v. California, 112 S. Ct. 2572  
(U.S. 1992) ..... 18

Moyer v. Peabody, 212 U.S. 78 (1909) ..... 7

<u>Nguyen Thang Loi v. Dow Chem. Co.</u> , 373 F. Supp. 2d 7 (E.D.N.Y 2005) .....	9
<u>Patterson v. New York</u> , 432 U.S. 197 (1977) .....	18
<u>Santosky v. Kramer</u> , 455 U.S. 745 (1982) .....	21
<u>US v. Salerno</u> , 481 U.S. 739 (1984) .....	23
<u>Youngstown Sheet &amp; Tube Co. v. Sawyer</u> , 343 U.S. 579 (1952) .....	15

**Constitution and Statutes:**

U.S. Const., amend. 5 .....	<i>passim</i>
U.S. Const., art. II, §2 .....	5, 14, 15
Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat 224 (2001) .....	<i>passim</i>
Federal Habeas Statute, 28 USC 2241 et. seq. ....	19,23
Military Commissions Act of 2006, Pub. L. No. 1009-366, §948a(2), 120 Stat. 2600, 2601 .....	8
Patriot Act of 2001 Pub. L. No. 107-56, 115 Stat. 272 .....	<i>passim</i>

**Treatises and Other Materials**

Tom Lantos, Speech to the House, 147 Cong. Rec. H 5638 .....	2
Alexander Hamilton, <u>The Federalist</u> , No. 23, p 113 (Carey and McClellan, eds. 2001) .....	1
Alexander Hamilton, <u>The Federalist</u> , No. 34, pp 164, (Carey and McClellan, eds. 2001) .....	1
Alexander Hamilton, <u>The Federalist</u> , No. 74, p 500, (J. Cooke, ed 1961) .....	15

William Winthrop, Military Law and Precedents 784  
(2d. ed., Beard Books 2000) (1896) .....10

**OPINIONS BELOW**

The opinion of the United States District Court for the District of East Dakota is unpublished and unavailable. The opinion of the Twelfth Circuit is at Ahmed v. United States, No. 06-9701 (12<sup>th</sup> Cir. Nov. 24, 2008).

**JURISDICTION**

The United States Court of Appeals for the Twelfth Circuit entered its judgment on November 24, 2008. Following judgment by the Twelfth Circuit, Burhan Uddin Ahmed filed a petition for writ of certiorari with the United States Supreme Court. The petition for a writ of certiorari was timely filed, and certiorari was granted. The jurisdiction of this court arises under 28 USCA §1254(1). The case arises under the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), and the Fifth Amendment to the U.S. Constitution.

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

1. 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'.

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

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

(b) War Powers Resolution Requirements-

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

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

Approved September 18, 2001.

## 2. Amendment V, U.S. Constitution

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

## STATEMENT OF THE CASE

1. "Let us recollect," Hamilton instructed, "that peace or war will not always be left to our option." The Federalist, No. 34, pp 164, (Carey and McClellan, eds. 2001). War sometimes comes to our doorsteps. With this proviso guiding him, Hamilton noted that the "common defence [sic]" dictated powers that should be "without limitation" because "it is impossible to foresee or to define the extent and variety of national exigencies." Id., No. 23, at 113. Global terrorism is an uncanny example of Hamilton's prescience. On September 11, 2001, al Qaeda operatives hijacked four commercial airliners. The operatives seized the airliners and flew them into important governmental and commercial centers on United States soil. The operatives completely destroyed the World Trade Center towers and caused enormous damage to the Pentagon. In total, approximately 3,000 individuals, almost all of whom were civilians, were killed. Hamdan v. Rumsfeld, 548 U.S. 557, 568 (2006).

2. Congress responded with swiftness, and on September 18, 2001, passed a Joint Resolution entitled the Authorization for the Use of Military Force (AUMF), granting the President 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 on

September 11, 2001, or harbored such organizations or persons." Pub. L. No. 107-40, 115 Stat 224 (2001). The broadly worded resolution matched Congress's resolve. According to Congressman Lantos, the resolution "will enable [the President], in the words of our Secretary of State, to eradicate terrorism, 'root and branch.'" 147 Cong. Rec. H 5638. Congress fully expected the President to use the entire weight of his authority to execute the "war on terror," both at home and abroad.

3. Petitioner Burhan Uddin Ahmed is a citizen of Pakistan who entered the United States on September 8, 2001, three days before the catastrophic 9/11 attacks. Four months later, federal agents arrested him as a party of interest in the Government's investigation. He was charged in the District of East Dakota with various crimes. After further investigation, however, the Government discovered Ahmed's extensive al Qaeda connections.

4. The nature of the allegations against Ahmed are startling. App. A. Ahmed had extensive training from al Qaeda camps, specifically in the use of poisons. Pursuant to this training, he had strong connections to the al Qaeda leadership, including Osama Bin Laden. Ahmed received funding from al Qaeda. His laptop contained research regarding mass use of chemical weapons, as well as lectures by Bin Laden and other top al Qaeda officials on the importance of jihad and martyrdom. He

was instructed to hack into the mainframe of the Social Security Administration in order to create chaos in the nation's primary financial welfare program. After September 11, 2001, there was extensive communication between al Qaeda officers and telephone numbers in Wilson, East Dakota. App. A.

5. Based on this evidence, the Government determined that Ahmed entered the United States as an al Qaeda agent whose goal was to commit further acts of international terrorism. Thus, Ahmed represented a "continuing, present, and grave danger to the national security of the United States," and the President therefore issued an order, the Murphy Declaration, attached as Appendix A, that determined that Ahmed was an "enemy combatant." App. A. The district court found that Ahmed was entitled to a habeas corpus hearing and instructed a magistrate judge to provide Ahmed with an opportunity to demonstrate that he was not an enemy combatant. The magistrate judge ruled that the evidence from the Government was sufficient, credible evidence that would warrant holding Ahmed as an enemy combatant. The judge allowed Ahmed sixty days to present factual evidence that rebutted the Murphy Declaration. Ahmed issued a general denial, but refused to offer any evidence. The magistrate judge dismissed the habeas petition, and the district court affirmed the dismissal.

6. Ahmed appealed to the Twelfth Circuit, arguing that the President did not have the authority to detain him and that the procedures that the magistrate judge employed did not satisfy the Fifth Amendment requirements of due process. A panel of the Twelfth Circuit Court of Appeals affirmed the district court's ruling. Accepting the petition to hear the case en banc, the Twelfth Circuit held that while the President had the authority under the AUMF to detain Ahmed, the magistrate judge's system did not satisfy due process under the Fifth Amendment. Ahmed petitioned the Supreme Court for certiorari, which this Court granted.

#### **SUMMARY OF THE ARGUMENT**

As this Court has long and consistently recognized, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Hamdi v. Rumsfeld, 542 U.S. 507, 580 (Thomas, J., dissenting) (quoting Haig v. Agee, 453 U.S. 280, 307 (1984); Aptheker v. Secretary of State, 378 U.S. 500, 509 (1961)). Furthermore, "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. at 292. This framework underscored the Court's plurality decision, and most apposite precedent for Ahmed's case, Hamdi v. Rumsfeld, 542 U.S. 507 (2006).

As interpreted by this Court's plurality in Hamdi, the AUMF authorizes the President to detain enemy combatants. Like Hamdi, Ahmed is an enemy combatant. Not only does Ahmed fit the narrow framework provided by this Court in Hamdi because he is an armed force hostile to the United States, but also, labeling him as an enemy combatant comports with the laws of war that are within the permissible bounds allowed by this Court's Quirin precedent. Ex Parte Quirin, 317 U.S. 1 (1942). Furthermore, Article II of the Constitution provides the President inherent war power authority to detain Ahmed. These powers are notwithstanding any limitations of the Patriot Act, an act that applies to separate Presidential powers.

The standard of due process that governs enemy combatant proceedings is also governed by Hamdi. The three-part test from Hamdi guides district courts by ensuring minimum standards of due process in enemy combatant proceedings. The district court in this case clearly employed the Hamdi burden-shifting scheme and adequately assured that Ahmed received due process. The "most reliable available evidence" standard would amount to providing Ahmed a full-blown adversarial hearing and allow more process for Ahmed than that which was received by Hamdi. Nothing in Hamdi countenances such a drastic revision, and allowing the court of appeals decision in this case to stand would effectively overrule Hamdi.

## ARGUMENT

### **I. THE PRESIDENT HAS THE AUTHORITY TO DETAIN AHMED AS AN ENEMY COMBATANT**

As interpreted by this Court's plurality in Hamdi, the AUMF authorizes the President to detain enemy combatants. Ahmed is an enemy combatant because he fits the narrow Hamdi framework, and because labeling him as such is in tandem with the laws of war and within the permissible bounds allowed by this Court's precedent. Finally, Article II of the Constitution provides the President inherent war power authority to detain Ahmed, notwithstanding any limitations of the Patriot Act.

#### **A. The AUMF Authorizes the President to Detain Enemy Combatants**

This Court's plurality in the Hamdi decision makes clear that the AUMF authorizes the President to detain enemy combatants. The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons" he determines were associated with the September 11, 2001 terrorist attacks. 115 Stat 224. The Court concluded that "detention...is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." Hamdi, 542 U.S., at 518. The plurality found "legislative authority to detain under the AUMF once it is

sufficiently clear that the individual is, in fact, an enemy combatant.” Id. at 523. See also Boumediene v. Bush, 128 S.Ct. 2229 (2008). The court “has previously concluded that language materially identical to the AUMF authorizes the Executive to “seiz[e] the bodies of those whom he considers to stand in the way of restoring peace.” Hamdi v. Rumsfeld, 542 U.S. at 587 (Thomas, J., dissenting.) (quoting Moyer v. Peabody, 212 U.S. 78, 84). As an “enemy combatant,” the Government was justified under the AUMF to detain Hamdi until the end of active hostilities. The Government detained Hamdi in order to prevent him from returning to the battlefield.

Like Hamdi, the Government detained Ahmed as an enemy combatant. The risks posed by Ahmed were equally—if not more—grave, than those posed by Hamdi, and his detention is necessary to prevent him from committing terrorist acts. While we believe that Ahmed fits within the Hamdi description of an enemy combatant, we understand that the President’s authority to detain enemy combatants is not limited to just those individuals that fit the Hamdi framework. If the AUMF is to have any meaning at all, Ahmed is most certainly an enemy combatant within the understanding of laws of war and within the permissible bounds articulated in this Court’s precedents.

1. **Ahmed Is an Enemy Combatant Within the "Narrow Category" Articulated in Hamdi**

Ahmed clearly fits the narrow category of an enemy combatant that the Court's plurality describes in Hamdi: an individual who was "part of or supporting forces hostile to the United States or coalition partners" and who "engaged in an armed conflict against the United States." Hamdi, 542 U.S. at 516. Ahmed is a member of al Qaeda, a force obviously hostile to the United States, and engaged in an armed conflict by entering this country with hostile intent to use poisonous chemicals and hack into the main-frame computers of the Social Security Administration.

The AUMF authorizes the President to not only use force against "nations" responsible for the September 11 attacks, but also "organizations." 115 Stat. 224. As noted by this Court's Hamdi plurality, it was the "al Qaeda terrorist network responsible for those attacks." Hamdi, 542 U.S. at 518. As the Twelfth Circuit below bluntly put it, "it defies logic to believe that Congress, in the days after 9/11, did not intend for the AUMF to allow the President to pursue individuals like the attackers who had just killed almost 3,000 people in the United States." J.A. 15. Congressional intent is made clearer by looking to the Military Commissions Act of 2006 which stated that a person "who is part of the Taliban, al Qaeda, or

associated forces" is eligible for military tribunals. Military Commissions Act of 2006, Pub. L. No. 1009-366, §948a(2), 120 Stat. 2600, 2601. By including the Taliban *and* al Qaeda, Congress recognizes that both are hostile forces with whom the United States is at war.

Furthermore, al Qaeda operates as a "de facto government": it has an army, a treasury, a civil service, an intelligence operation, a quasi-welfare program, a hierarchy of officials who promulgate laws that are enforced "ruthlessly," and, most importantly, it declares wars. Phillip Bobbitt, The Shield of Achilles 820 (2002). The broad language of the AUMF, inclusive of governments *and* organizations responsible for the 9/11 attacks, shows that Congress intended its authorization for individuals like Ahmed, who are members of al Qaeda.

Ahmed intended to use chemical poisons and computer hacking as weapons of mass destruction and was therefore engaged in an armed conflict against the United States. Certainly, using poison on civilians constitutes an "armed conflict." See Nguyen Thang Loi v. Dow Chem. Co., 373 F. Supp. 2d 7, 116 (E.D.N.Y. 2005) (discussing the use of poisons as methods of warfare). To have any meaning at all, or at the very least have the effect to prevent the attacks that initiated its passage, the AUMF must be interpreted to prevent the type of activity in which Ahmed was engaged. An "armed conflict," at least in the advanced methods

of global terrorism, includes the hijacking of planes, not just the use of traditional weaponry. See also, William Winthrop, Military Law and Precedents 784 (2d. ed., Beard Books 2000) (1896). A narrow, traditional, view of "armed conflict" would ignore the evolving status of the laws of war, purposefully deny congressional intent, and thwart the Constitutional framework that places the ability to define terms into the hands of the Legislative and Executive branches.

**2. Ahmed Is an Enemy Combatant Under the Permissible Bounds of this Court's Precedent**

Enemy combatants are not just those that fit the Hamdi framework. Significantly, Justice O'Connor noted, "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them." 542 U.S. at 522. Even if Ahmed were not an enemy combatant within the narrow Hamdi framework, he is surely an enemy combatant within the "permissible bounds" allowed by the Court.

Congress intended to protect its citizens from enemy combatants such as Ahmed. They granted the President "all necessary and appropriate force." 115 Stat. 224. It has long been understood that detaining enemy combatants is a "fundamental and accepted . . . incident of war." 542 U.S. at 517. Those considered by Congress had just committed "treacherous violence" against the United States. 115 Stat.

224. Holding that the AUMF does not authorize detention of Ahmed would therefore defeat the AUMF's entire purpose. Indeed, such a ruling would prevent the President from detaining the very individuals responsible for the AUMF's passage: the 9/11 hijackers. The AUMF must allow the President to detain individuals, such as Ahmed and the 9/11 hijackers, who are members of an organization against whom Congress specifically authorized the use of military force and who are intent on harming Americans in al Qaeda's name. Otherwise, the AUMF fails to accomplish the very purpose for which it was passed.

Ahmed is an enemy combatant under laws of war and the Quirin precedent. 317 U.S. 1(1942). Both Quirin and Hamdi look to the traditional laws of war for the definition of an enemy combatant. See, e.g., Al-Marri v. Pucciarelli, 534 F.3d 213, 2 (2008) (Wilkinson, J, dissenting). Judge Wilkinson notes that "several factors have traditionally been considered relevant to the determination of whether someone is a combatant," one of which is whether the individual was "under responsible command." Furthermore, Wilkinson notes that "[n]o single factor must exist," including the detainee's presence on a battlefield. Id. For example, Quirin held that "[c]itizens 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 [combatants] within the

meaning of . . . the law of war." 317 U.S. at 37-38. In Quirin, the Court held that the detainees were enemy combatants, despite that they had "not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations"; instead, the fact that they entered the United States "with hostile purpose" and were working in conjunction with and paid by an enemy with whom the United States was at war sufficed. 317 U.S. at 38. The Quirin detainees never participated in live hostilities on a battlefield, and this Court ruled that they were nevertheless enemy combatants. Quirin remains undisputed law, and all of the major detainee cases, including Hamdi specifically rely it.

This Court's determination in Quirin should be followed for Ahmed. Ahmed is associated with al Qaeda. Ahmed entered this country bent on hostile purposes. The United States has authorized the use of force against al Qaeda. Ahmed was directed and paid by al Qaeda to initiate hostile acts. If the unanimous holding of Quirin is to have any meaning, it must be that individuals such as Ahmed are enemy combatants.

The holding of Milligan does not apply once an individual has been classified an enemy combatant, and therefore does not apply to Ahmed. 71 U.S. 2, 6 (1866). Milligan held that *civilians* lawfully residing within the United States may not be subjected to indefinite military detention and the attendant

deprivation of their constitutional rights. 71 U.S. at 6, emphasis added. However, this holding is irrelevant to “*combatants*.” Once the Court rightfully determines through one of the above frameworks, either provided by Hamdi or by the laws of war and Quirin precedent, that Ahmed is in fact an enemy combatant, the narrow Milligan precedent does not apply. As this Court recognized in Quirin, the Court’s holding in Milligan had “particular reference to the facts before it.” 317 U.S. at 45. As Justice O’Connor recognized, Quirin now “provid[es] us with the most apposite precedent that we have on the question” of which individuals may be detained. Hamdi, 542 U.S. at 523. The holding of Milligan was extremely limited to its very specific facts by the Quirin decision. Within the particular context of an American civil war, Milligan required a delicate balance between civilian and combatant; after all, every combatant was also arguably a civilian. That Congress authorized the use of force against al Qaeda in the AUMF, but not against its own citizens during the Civil War, provides substantial differentiation between the facts there and those provided here. The plurality of Hamdi explained that had “different circumstances been present, he could have been detained under military authority.” Hamdi, 542 U.S. at 522.

The different circumstances necessary to detain Ahmed as an enemy combatant are present here. Ahmed is not a civilian, but

instead entered this country an enemy combatant with hostile intent, is involved in an international conflict, and is partnered with a congressionally identified enemy of the United States. Ahmed is an enemy combatant under the precedent of Quirin, and the narrow Milligan decision, applicable only to civilians, does not apply.

**C. The Constitution Inherently Authorizes the President to Detain Ahmed as an Enemy Combatant**

Even if the Court found no authorization under the AUMF to detain Ahmed as an enemy combatant, the President has sufficient inherent authority in the Article II war powers to detain Ahmed. The President's authority is, in fact, augmented by the passage of the AUMF and is not undermined by the Patriot Act.

**1. The AUMF Authorized War and Engaged the President's War Powers to Detain Enemy Combatants Under Article II of the Constitution**

Article II states that "the President shall be Commander in Chief of the Army and Navy of the United States." U.S. Cons., Art. II, § 2. The President's authority to wage war is an essential power granted by Article II of the Constitution and fluctuates according to congressional intent. See Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-

Chief and as the Nation's organ in foreign affairs.") Alexander Hamilton explained, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." The Federalist No. 74, at 500. It is self-evident that, "The national security, after all, is the primary responsibility and purpose of the Federal Government." Hamdi, 542 U.S. at 580 (Thomas, J., dissenting). To assess claims of presidential power, the Supreme Court has long recognized, as Justice Kennedy stated most recently, that courts look to the framework set forth by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). See Hamdan, 126 S. Ct. at 2800 (Kennedy, J., concurring). Justice Jackson explained that, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Youngstown, 343 U.S. at 635. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," Id., but "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," Id. at 637.

The President's authority to detain Ahmed is, therefore, at its maximum because it is in conjunction with the authority provided by Congress in the AUMF. The AUMF authorizes the

President, who by virtue of Article II already possesses some inherent war powers, to use "necessary and appropriate force" against organizations and persons with a role in the September 11 attacks, necessarily including al Qaeda. In Hamdi, the Supreme Court recognized that the AUMF authorized war when it held that detaining individuals was a "fundamental incident of waging war." Hamdi, 542 U.S. at 519. That the AUMF does not specifically mention military detention is of no consequence: "[S]uch failure of Congress[to include military detention]... does not, 'especially... in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." Hamdi, 542 U.S. at 583 (Thomas, J., dissenting) (quoting Dames & Moore v. Regan, 453 U.S. 654, 678). The AUMF provides clear authorization of force against al Qaeda and the Court should defer to the superior military capabilities of both the Executive and the Legislative branches.

## **2. The Patriot Act Does Not Limit the President's War Powers**

The Patriot Act does not eliminate the statutory authority provided the President in the AUMF because the AUMF is more specific to Ahmed and the two acts operate in different spheres of Presidential power. The Patriot Act's point of emphasis is on providing law enforcement with additional tools and tactics—such as an increased ability to access records, regulate

financial transactions, and perform surveillance -- designed to prevent terrorism generally, regardless of whether the suspect was associated with 9/11. See Pub. L. No. 107-56, 115 Stat. 272 (2001).

The Patriot Act does not eliminate the statutory authority provided the President in the AUMF to detain individuals who fit within the "legal category" of enemy combatant; thus, if an alien "qualif[ies]" as an enemy combatant, then the AUMF authorizes his detention. Hamdi, 542 U.S. at 516. The AUMF represents a specific response to the 9/11 attacks, authorizing military force against those responsible for the attacks. The Supreme Court has instructed that, "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." Busic v. United States, 446 U.S. 398, 406, 100 S. Ct. 1747, 64 L. Ed. 2d 381 (1980); see also Edmond v. United States, 520 U.S. 651, 657 (1997). Like Milligan, the provisions of the Patriot Act are relevant only *after* it has been determined an individual does not constitute an enemy combatant -- not before. Therefore, because Ahmed is an enemy combatant, the relevant AUMF must apply, not the Patriot Act.

## **II. AHMED RECEIVED THE PROCESS THAT HE IS DUE UNDER THE FIFTH AMENDMENT.**

This Court has long held that the Fifth Amendment due process clause requires only that the "most basic procedural

safeguards be observed," not that an individual is entitled to the highest level of protections that a court could envision. Medina v. California, 112 S. Ct. 2572, 2581 (U.S. 1992). Furthermore, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." Patterson v. New York, 432 U.S. 197, 208 (1977). With this framework as background, the standard of due process that governs enemy combatant proceedings was laid down in this Court's recent decision in Hamdi. The three-part test from Hamdi guides district courts by ensuring minimum standards of due process in enemy combatant proceedings. The district court in this case clearly followed Hamdi's lead and employed a burden-shifting scheme that adequately assured that Ahmed received the process that he is due. The court of appeals reversed the district court. In doing so, the court of appeals allowed more process for Ahmed than Hamdi received, an outcome that is at odds with the Court's decision in Hamdi.

**A. The Hamdi Plurality Applied the Mathews Balancing Test and Stated the Minimum Requirements for Due Process in Enemy Combatant Proceedings.**

Hamdi directs lower courts to use straight-forward three-part test when deciding whether a detainee has received due process. The question of the level of process required in enemy

combatant proceedings was squarely before the Court in Hamdi. 542 U.S. at 524. In Hamdi, the Court recognized that when individuals, even enemy combatants, are held against their will by the Government, they are entitled to a writ of habeas corpus proceeding pursuant to 28 U.S.C §2241, in which the Government must provide the rationale for labeling the detainee an enemy combatant and the detainee must have the opportunity to challenge the basis for detention.

The rule from Hamdi forged a middle ground between the standard of allowing "some evidence" without "a factual inquiry," urged by the Government, and the "unwarranted" full-blown discovery procedures executed by the trial court. Hamdi, 542 U.S. at 532-33. The Court reasoned that, "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." Id. at 537. The Court further noted that, "An essential principle of due process is that a deprivation . . . be preceded by notice and opportunity for hearing. . ." Id. at 533 (quoting Cleveland v. Bd. Of Educ. v. Loudermill, 470 U.S. 532). Pursuant to this rationale, the plurality devised a three-part test that now governs the due process threshold in enemy combatant proceedings: "We therefore

hold that a citizen-detainee<sup>1</sup> . . . 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." Id. at 533. Ahmed does not assert, nor could he, that he is entitled to a higher than usual level of process, and therefore, the only question is whether the district court in the present case used the Hamdi framework. Once these three elements are present—notice, a fair opportunity to rebut facts, and a neutral decisionmaker—the dictates of the Fifth Amendment have been satisfied.

Crucially, the Twelfth Circuit misinterpreted the way that Mathews and Hamdi interact. In deciding Hamdi, this Court looked first to Mathews v. Eldridge. 424 U.S. 319 (1976). Mathews introduced a balancing test that this Court has used in subsequent due process cases in a wide variety of contexts, including in Hamdi. Hamdi, 542 U.S. at 529. See also U.S. v. Salerno, 481 U.S. 739 (1985) (noting that Mathews governs procedural due process determinations). The Mathews test requires that courts consider first, the private interest that will be affected; second, the "risk of an erroneous deprivation" of that interest, along with the "probable value of any additional or substitute procedural requirements"; and, finally,

---

<sup>1</sup> We note that the plurality in Hamdi refers only to citizens, but we assume, *arguendo*, that legal residents are included within Hamdi's rubric.

the Government's interest, including the burdens that higher process would impose on the Government. Id. at 335.

Importantly, the Court has noted that the Mathews test is used to determine the dictates of due process for a specific kind of proceeding: "the Court has engaged in a straightforward consideration of the factors identified...to determine whether a particular standard of proof in a *particular proceeding* satisfies due process." Santosky v. Kramer, 455 U.S. 745, (1982) (emphasis added). See also Addington v. Texas (holding that the Mathews inquiry governs a "particular type of adjudication.") 441 U.S. 418, 423 (1979) (emphasis added).

Once the Court lays out the standard of due process, however, there is no further need to engage in a Mathews balancing inquiry. In other words, once the Court determined in Santosky, for example, that clear and convincing evidence was required in custody proceedings—that is, in *that particular type of proceeding*—lower courts were bound by that rule *in that particular type of proceeding*. Santosky, 455 U.S. at 754. After Santosky, surely a district court could not re-balance the Mathews interests and determine a new factual situation required a lower (or higher, for that matter) evidentiary threshold. Doing so would rewrite Santosky and undermine the Supreme Court's authority to delineate the precise contours of the Fifth Amendment.

The Twelfth Circuit below makes this grave mistake, and redefines both Hamdi and the Fifth Amendment. The decision went beyond the Hamdi requirements, imposing a higher level of process than the rule that Hamdi announced. After considering both the private interests and the Government's interests, the Court has already announced a minimum threshold that is constitutionally required in enemy combatant proceedings—and that rule comes from Hamdi. Using the Hamdi test of notice, fair opportunity, and a neutral decisionmaker as guidance would therefore be sufficiently protective under the Fifth Amendment. The Twelfth Circuit's decision is flawed insofar as it recalibrates the interests and effectively redefines the minimum threshold of due process due in enemy combatant proceedings.

**B. The District Court Followed Hamdi's Due Process**

**Inquiry and Satisfied the Fifth Amendment**

Hamdi makes clear that Ahmed is entitled to challenge his detention through some form of habeas corpus proceeding. The Court can alter habeas procedures in some situations so that due process does not require a full-blown adversarial hearing. See, e.g, Kansas v. Hendricks, 521 U.S. 346 (1997) (holding that mentally ill sex offenders are not constitutionally entitled to a criminal hearing before they are involuntarily committed); US v. Salerno, 481 U.S. 739 (1984) (affirming the detention of dangerous persons pending a trial). One of those exceptions,

of course, is enemy combatants. According to Hamdi, enemy combatants "are not entitled to the full procedural protections guaranteed to criminal defendants." See also Boumediene, at 2269.

Instead, the Hamdi rule requires lower courts to satisfy three elements: 1) notice of the allegations; 2) a fair opportunity for the petitioner to rebut the factual allegations leveled against the detainee; and 3) a neutral decisionmaker. Hamdi, 542 U.S. at 533. Obviously, the district court is a "neutral decisionmaker," and the Murphy Declaration clearly provides notice. The question remains whether Ahmed's proceeding involved a "fair opportunity" to rebut the factual allegations against him.

The magistrate judge employed procedures that were taken almost verbatim from Hamdi and clearly provided Ahmed with sufficient process. Hamdi noted that the habeas statutes provide a "skeletal outline" for habeas practice in enemy combatant proceedings. 28 U.S.C. §2241 *et seq.*; Id. at 525. The magistrate judge crafted a system that bears similarity to a regular habeas proceeding: both parties have an opportunity to put forth evidence in the form of affidavits and other evidence so that the judge may make an initial determination of which party is more persuasive. See also Al-Marri v. Pucciarelli, 534 F.3d 213, 291 (2008) (Williams, J., concurring). In fact,

contrary to usual habeas practice, the judge placed the *initial* burden of producing "credible evidence" on the Government, rather than on the petitioner. Hamdi, 542 U.S. at 534. See also Garlotte v. Fordice 515 U.S. 39 (1995); Al-Marri, 534 F.3d at 291.

The judge also provided Ahmed sixty-days to produce evidence more persuasive than that of the Government. Considering that the Government's evidence was hearsay, nearly any evidence *whatsoever* would have been more persuasive. If Ahmed had participated in any way beyond a perfunctory denial, he would have potentially been entitled to a release or to have the Government provide him with an adversarial hearing with full evidentiary protections. Even though Boumediene is inapposite here and did "not endeavor to offer a comprehensive summary of the requisites . . . for habeas corpus," Ahmed's case meets even the Boumediene standard. Boumediene, 128 S.Ct. at 2271 (outlining several factors, including whether the habeas court can order release, whether there was an adversarial structure, whether there was access to counsel.)

Hamdi specifically contemplated a burden-shifting scheme such as the one that the judge employed in Ahmed's case. According to Hamdi, a "burden shifting scheme" in which "the Government puts forth credible evidence" that may be provided by the summary of a "knowledgable affiant," is sufficient under the

Fifth Amendment. Hamdi, 542 U.S. at 534. With that level of process, the Hamdi plurality notes that the habeas court has demonstrated “meaningful support” that the “risk of an erroneous deprivation” is minimal; this system “would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker” is not illegally detained. Id. at 534. This is precisely the system that the magistrate judge used in this case, except that the magistrate judge went further, presenting Ahmed with the opportunity to receive a full-blown hearing. If Ahmed did not receive due process, it is entirely of his own making. He chose not to participate, even when doing so would have been easy and could have made all the difference.

The plurality below found that the procedures did not satisfy due process because the Government did not produce the “most reliable available evidence.” J.A. 24. This evidentiary burden imposes an unsupported reading of Hamdi. Indeed, Hamdi notes that, “the exigencies of the circumstances may demand that, apart from these core elements . . . enemy combatant proceedings may need to be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” Hamdi, 542 U.S. at 534. The focus here is two-fold: first, lower courts may not depart from the three-part test for minimum due process; second, the proceedings may need to be tailored to make the proceedings *less burdensome* for the

*Executive.* The entire timbre of the Hamdi plurality opinion is that district courts should have flexibility in determining procedures in enemy combatant proceedings. It makes little sense for the Hamdi court to derive a three-part test for due process, only to *imply* a higher than normal evidentiary burden. The Hamdi plurality held that once the "Government puts forth *credible* evidence," then the Government had satisfied its burden. Id. at 534. Hamdi goes on to note that a "knowledgeable affiant" that had summarized the records to an independent tribunal would satisfy this "credible evidence" standard. Id.

Furthermore, the most reliable available evidence destroys the Hamdi opinion's emphasis on proceeding with "caution." Hamdi notes that district courts should be "incremental" and "prudent." Id. at 539. This evidentiary rule is exactly the opposite: it is a rigid rule that destroys the flexibility of traditional process inquiries, which focus on a case-by-case approach. See also Boumediene, 128 S.Ct. at 2267 (noting that habeas proceedings have always been "adaptable").

The plurality was wrong to impose the most reliable available evidence on the Government, which does not comport with a fair reading of Hamdi. The Government has determined, based on credible evidence, that Ahmed is a person who aided disastrous attacks on American soil and is intent on committing further terrorist atrocities against innocent American

civilians. Because Hamdi does not require the most reliable available evidence, and because the district court followed Hamdi's instructions almost verbatim, Ahmed received sufficient due process.

**C. Ahmed is Not Entitled to More Process than Hamdi**

**Received**

Ahmed, like Hamdi, sought a full adversarial hearing, which the Twelfth Circuit would grant. The only tenable reason for making a distinction between the two cases, though, is based on the location of Ahmed's capture. Such a distinction is seriously flawed. Hamdi contains absolutely no discussion of the location of capture in the due process context; instead, Hamdi relies explicitly on Quirin to ground its holding that the AUMF authorizes detaining enemy combatants in the first instance. Hamdi, 542 U.S. at 538. Quirin involved "civilians" who were collaborating with the Nazi government to sabotage American interests on American soil. Ex Parte Quirin, 317 U.S. 1. Quirin was not captured on a foreign battlefield, and yet the Court ruled that he was nevertheless an enemy combatant. Id. The due process inquiry under Hamdi applies to all enemy combatant proceedings, regardless of the location of capture. As long as the definition of enemy combatant includes someone who is captured on American soil, which the plurality

recognizes, providing a different process than those captured on the battlefield makes no sense.

Granting Ahmed a higher level of procedural protections based merely on the location of his capture would unduly burden the Government's actions in conducting this war. Terrorist networks do not operate in the usual boundaries between countries, and the same concerns that animate Hamdi are present when the enemy combatant is detained on domestic soil. The potential damage by an al Qaeda operative inside the United States may be even greater than an operative who is captured on a foreign battlefield. As 9/11 showed, guns are often not the most dangerous weapons that terrorists may use. And the concerns with sensitive military information remaining confidential and with preventing the detained person from further harming the country while the military remains engaged in ongoing hostilities are equally compelling with a person captured within domestic territory. This distinction produces absurd results and is based on an insidious formalism, and the result will no doubt harm American interests.

Furthermore, while the Twelfth Circuit's opinion purportedly relies on Hamdi, the decision, in fact, is squarely at odds with Hamdi. Though it does so only covertly, the Twelfth Circuit decision would effectively overrule Hamdi by providing what amounts to criminal process in enemy combatant

proceedings. The district court in Hamdi used procedures that “would approach the process that accompanies a criminal trial,” but Hamdi explicitly declined to extend such extensive protections. See also Boumediene, 128 S.Ct. 2229.

This Court has long held that criminal procedures are abridged in other contexts. See Al-Marri, 534 F.3d at 305 (Wilkinson, J., concurring) (relying on case law to demonstrate that “the Constitution” allows “detention based on process less than that attendant to a criminal conviction.”) Hamdi was keenly aware of the problems associated with imposing burdens on the Government during an ongoing conflict, including the enormous difficulties that allowing a “trial-like” process would entail. Allowing extensive discovery has the potential to distract high-level Government officials from their more important duties of protecting our national security. Additionally, the potential for the loss of confidential sensitive information is great, even if the court adopts procedures that are intended to retain confidentiality, the information can nevertheless make its way into enemy hands. See Al-Marri, 534 F.3d at 306 (Wilkinson, J., concurring) (documenting a situation in which, despite the court’s best interests, confidential information was leaked.) Furthermore, providing Ahmed with criminal-like procedures may garner

sympathy for the terrorist cause, both at home and abroad, which would clearly affect our military's ability to conduct this war.

The Hamdi court was, no doubt, aware of these serious concerns, and crafted a rule that took into account both the interests of the detainee and the potential harm that would result from extensive discovery. The Hamdi plurality consequently refused Hamdi a process that amounted to a quasi-criminal proceeding. By granting Ahmed more process than Hamdi received, the Twelfth Circuit implicitly overrules Hamdi. Such an unprecedented rule will have far-reaching consequences and undermine the military's efforts to protect the American citizenry.

#### **CONCLUSION**

For the foregoing reasons, this Court should affirm the conclusion of the court of appeals that the President has the authority to detain Ahmed as an enemy combatant and reverse the conclusion of the court of appeals that Ahmed did not receive due process.

Respectfully submitted.

TEAM NUMBER 6834

Assistant Solicitor General  
Counsel of Record