

No. 08-11144

IN THE
Supreme Court of the United States

BURHAN UDDIN AHMED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

Team Number 7158
Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether the AUMF authorizes, and the constitution permits, the military detention of a legal resident, without trial or charge, based on a determination that he has conspired with al Qaeda to engage in terrorist activities.

- II. Whether the process afforded by the district court allowing a detainee classified as an "enemy combatant" to hear and rebut the factual evidence against him before a neutral decision maker qualifies as sufficient due process under the Fifth Amendment.

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STATEMENT OF THE CASE

In January 2002, Burhan Uddin Ahmed (Petitioner) was arrested in Wilson, East Dakota as a material witness in the United States government's investigation into the September 11 attacks. (R at 7.) Between November 2002 and January 2003, Petitioner was charged with possessing counterfeit Social Security cards with intent to defraud and with making a false statement to the FBI. Though he was scheduled to have a hearing on June 15, 2003, the United States government filed an ex parte motion to dismiss the indictment on June 13. (R at 7.) The motion was made pursuant to an order by the President which found Petitioner to be an enemy combatant. (R at 7.) In the order, the President determined that the further detention of Petitioner by the military was "necessary to prevent him from aiding al Qaeda." (R at 7.) Thereafter Petitioner was detained in an army detention facility in Eastern Dakota. (R at 8.) Petitioner filed a petition for a writ of habeas corpus to contest his detention, believing he must be afforded a full criminal hearing or be released from detention. (R at 8.) The United States, however, opposed his release, claiming Petitioner was affiliated with al Qaeda as a sleeper cell and as such, posed a great threat to national security. (R at 8.)

Evidence for the government's claim came from John R.

Murphy, the director of the Joint Task Force for Combating Terrorism. (R at 8.) In his Declaration, Murphy provided ample hearsay evidence that Petitioner was an al Qaeda agent, declaring that: Petitioner's affiliation with al Qaeda was established by intelligence indicating that he attended an al Qaeda training camp for eighteen months where he was "trained in the use of poisons;" (R at 47.) Petitioner "cultivated relationships with senior al Qaeda leaders, including Osama Bin Laden" by whom he was commissioned to enter United States as a "sleeper agent;" (R at 47.) Petitioner met personally with Osama Bin Laden to whom he "volunteered to be an al Qaeda martyr or to do whatever else was asked of him;" (R at 47.) Petitioner "received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator of 9/11;" (R at 47.) Petitioner was a contact point for new al Qaeda operatives as they entered the United States; (R at 47.) Petitioner was commissioned with investigating the possibility of hacking into the "main-frame computer systems of the Social Security Administration with the objective of creating chaos in the United States' social safety net and securing revenue for future terrorist attacks through Social Security fraud;" (R at 47.) The forensic analysis of Petitioner's laptop revealed that he had been researching the use of weapons of mass destruction, that he possessed programs typically used by hackers, and that he had files containing

lectures by Bin Laden and others on the importance of jihad, martyrdom and the nobility of the Taliban regime; (R at 48.) and that in the wake of September 11, 2001, "calling cards and cellular phone accounts attributed to [Petitioner] were used to attempt to contact a high-ranking al Qaeda officer." (R at 48.)

As releasing Petitioner in light of this evidence was not an option, the district court consulted a magistrate judge who determined that Petitioner must be given notice of the factual basis of his detention. (R at 9.) In addition, the magistrate judge held that the burden would shift to Petitioner to refute his enemy combatant designation if the United States could produce credible evidence. (R at 9.) The United States did bring credible evidence, the Murphy Declaration, yet the magistrate judge held that if Petitioner could refute this evidence, he would be released or granted a full adversarial hearing. (R at 9.)

However, Petitioner refused to present any rebuttal evidence, although he was granted 60 days to do so. (R at 10.) As a result, the magistrate judge recommended that the district court dismiss Petitioner's petition for writ of habeas corpus. (R at 10.) Petitioner appealed this decision to the Twelfth Circuit, where the district court's dismissal was affirmed, and then vacated and heard en banc. (R at 10.) The Twelfth Circuit then concluded that although the President did have the

authority to detain Petitioner, he was not afforded sufficient process as mandated by the Fifth Amendment. (R at 28.) Before this Court is the question of the President's authority to detain Petitioner and of what process he is due.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Twelfth Circuit Court of Appeals, holding that the United States Government has the authority to detain Petitioner. Further, this court should reverse the holding of the Twelfth Circuit and rule that Petitioner received adequate and sufficient process due under the Fifth Amendment.

First, the President has authority to submit legal residents whom he has determined as terrorist conspirators with al Qaeda to military detention. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (hereinafter AUMF) authorizes such detention. Individual members of al Qaeda are properly considered enemy combatants and as such are subject to the President's use of "necessary and appropriate force." The AUMF allows indefinite detention of enemy combatants. A suspect's legal residency in the United States does not shield him from enemy combatant status. Furthermore, the President has constitutional authority to militarily detain al Qaeda conspirators as enemy combatants. He

has power to wage war under the constitution. Indefinite detention is considered fundamental to the waging of war. The Fifth Amendment of the constitution does not prevent indefinite detainment. Furthermore, the President's power to indefinitely detain individuals who conspired with al Qaeda is supported by the Supreme Court's decision in *Youngstown Sheet & Tube Co. V. Sawyer*. Thus the Petitioner's military detention is authorized by the AUMF and permitted by the constitution.

Further, the Twelfth Circuit was incorrect in ruling that Petitioner did not receive sufficient process to challenge his designation as "enemy combatant" when Petitioner was afforded his full Fifth Amendment rights. The district court correctly applied the *Hamdi* framework to a threat of transnational warfare by balancing individual rights with national security.

Petitioner received appropriate procedural process when he (1) received notice of the factual basis for his detention, (2) had full opportunity to rebut the evidence presented for his enemy combatant designation in front of (3) a neutral decisionmaker. In addition, Petitioner is not entitled to any greater process than the *Hamdi* detainee, as the definition of a battlefield has expanded with the progress of jihad transnational warfare. The court appropriately admitted the Murphy Declaration as the most

reliable evidence and thereby shifted the burden of proof to Petitioner.

As such, Petitioner was appropriately detained by the United States and was afforded sufficient process to satisfy the Fifth Amendment.

ARGUMENT

As the Court will be reviewing a consideration for a petition for a writ of habeas corpus in its unique context, the appropriate standard of review for legal conclusions is de novo. *Calvin v. Taylor*, 324 F.3d 583, 586 (8th Cir. 2003). However, any findings of fact made by the district court should be reviewed for clear error. *Sinistaj v. Burt*, 66 F.3d 804, 807 (6th Cir. 1995).

I. THE TWELFTH CIRCUIT WAS CORRECT IN HOLDING THAT THE AUMF AUTHORIZES, AND THE CONSTITUTION ALLOWS, THE SEIZURE AND INDEFINITE MILITARY DETENTION OF A LEGAL RESIDENT 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.

A. THE AUMF AUTHORIZES 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.

The President has broad discretion in using force against al Qaeda and its operatives. AUMF, 115 Stat. 224. The AUMF grants the President authority "to use all necessary and

appropriate force against. . . organizations, or persons. . . he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Id.* Individual members of al Qaeda are properly considered enemy combatants and as such are subject to the Presidents "necessary and appropriate force." *Id.* The AUMF allows indefinite detention of enemy combatants. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (O'Connor, S., plurality). A suspect's legal residency in the United States does not shield him from enemy combatant status. *Padilla v. Hanft*, 423 F.3d 387, 397 (4th. Cir. 2005); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

1. The AUMF authorizes the President to take action against members of al Qaeda as enemy combatants.

The President has authority to take any action against al Qaeda that is necessary and appropriate. AUMF, 15 Stat.

224(2) (a). The AUMF grants the President authority to employ "all necessary and appropriate force" against "organizations" which he determines to have "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001" to prevent future terrorist attacks. *Id.* It is indisputable that al Qaeda was the organization behind the attacks which took place on U.S. soil on September 11, 2001. *Hamdi*, 542 U.S. at

509. As a result al Qaeda is "an entity with which the United States is at war" and is subject to his use of "necessary and appropriate force." *Padilla*, 423 F.3d at 389.

Enemy combatant status cannot be limited to those individuals who took up arms in a traditional warzone. The AUMF was enacted to prevent another terrorist attack resembling that which occurred on September 11, 2001 from recurring. AUMF, 115 Stat. 224. None of the actual perpetrators of the 9/11 terrorist attacks had ever traditionally taken up arms against the United States. The 9/11 Commission Report, 215-253 (2004). Thus any who would seek to perpetrate such an attack as the AUMF was drafted to prevent would not qualify as an enemy combatant under any scheme requiring that enemy combatants take up arms in a traditional field of war. Such a narrow definition of enemy combatant would have prevented the President from taking timely action against the 9/11 perpetrators, and would prevent him from taking timely action against future threats. Therefore, the AUMF is only effective against attacks like that of September 11, 2001 if it enables the President to take significant action against non-traditional enemy combatants such as those that perpetrated the 9/11 attacks.

Ahmed is an enemy combatant pursuant to the AUMF. AUMF, 115 Stat. 224(2)(a). AUMF designates those organizations and

persons whom the president determines to be responsible for the 9/11 attacks or harboring those persons and organizations as subjects of the Presidents use of military force. *Id.* According to the Murphy Declaration, Ahmed was an active agent of the organization against which AUMF is aimed, whose terrorist actions included researching weapons of mass destruction, meeting with al Qaeda leaders, acting as a contact for al Qaeda members coming into the United States, and other actions dangerous to the United States. (R at 48-49.) The government's determination that necessary and appropriate action needed to be taken against Ahmed as a member of al Qaeda and as someone who supported the perpetrators of the 9/11 attacks (al Qaeda) is appropriate given the AUMF mandate to take action against those "organizations, or persons" who are determined by the President to have "planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001.

2. Legal Residence within the United States cannot shield an Individual from enemy combat status.

Legal residence within the United States cannot shield an individual from enemy combatant status. *Padilla v. Hanft*, 423 F.3d at 397; *Ex parte Quirin*, 317 U.S. at 37-38. In the World War II era case, *Ex parte Quirin*, two United States citizens were apprehended after entering the United States as part of a

plot against the United States on behalf of the German war effort. *Ex parte Quirin*, 317 U.S. at 22. The Supreme Court held that “[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful in violation of the law of war.” *Id.* at 38. The Fourth Circuit followed the *Quirin* precedent in the more recent case *Padilla*, 423 F.3d at 397. In *Padilla*, a United States citizen who was associated with al Qaeda, was apprehended entering the United States with the “avowed purpose of further prosecuting [al Qaeda’s] war on American Soil.” *Id.* at 389. The Fourth Circuit held that *Padilla*’s lawful residence and citizenship within the United States did not exempt him from the status of enemy combatant. *Id.* at 392.

If actual citizenship provides no shield to an individual against enemy combatant status, mere lawful residency certainly cannot afford protection against the Presidents declaration of such status against an individual. Therefore, Petitioner cannot be protected from being the subject of action pursuant to the AUMF by his status as a legal resident alien.

3. The President has the ability to indefinitely detain enemy combatants under the AUMF.

Part of the power granted under the AUMF is the ability of the president to detain enemy combatants. The Supreme Court

considered the President's authority to detain enemy combatants in *Hamdi v Rumsfeld*. The plurality concluded that "detention of individuals. . .for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of 'necessary and appropriate force' congress has authorized the President to use." *Hamdi*, 542 U.S. at 518; *See also, Padilla*, 423 F.3d at 397 (stating that among the powers granted to "protect American citizens from terrorist acts by those who attacked the United States on September 11, 2001" is "the power to detain identified and committed enemies.").

The Patriot Act does not limit the ability of the President to detain al Qaeda members and other non-traditional enemy combatants. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (hereinafter, Patriot Act). Though the Patriot Act prohibits the "indefinite detention" of terrorist aliens and mandates that the Attorney General begin removal proceedings or charge the alien with a criminal charge within seven days of detention, the act only affects the President's powers to "take Care that the Laws be faithfully executed" under Article II § 3 of the Constitution,

not his Article II § 2 war powers. Patriot Act §412(a); See also, U.S. CONST. Art. 2 §2-3.

Therefore, the President has authority to indefinitely detain individuals who have conspired with al Qaeda to engage in terrorist activities. Since the government has determined that Petitioner was an active al Qaeda agent who was pursuing terrorist activities, he is subject to indefinite detention pursuant to the President's power under the AUMF.

B. THE CONSTITUTION ALLOWS THE SIEZURE AND INDEFINITE MILITARY DETENTION OF A PERSON LAWFULLY RESIDING IN THE UNITED STATES, WITHOUT CRIMINAL CHARGES OR TRIAL, BASED ON GOVERNMENT ASSERTIONS THAT THE DETAINEE CONSPIRED WITH AL QAEDA TO ENGAGE IN TERRORIST ACTIVITIES.

The President as power to wage war under the constitution. U.S. CONST. Art. II. Indefinite detention is considered fundamental to the waging of war. *Hamdi*, 542 U.S. at 519. The Fifth Amendment of the Constitution does not prevent indefinite detainment. *Id.* at 533. Furthermore, the President's power to indefinitely detain individuals who conspired with al Qaeda is supported by the Supreme Court's Youngstown doctrine. *Youngstown Sheet & Tube Co. V. Sawyer*, 343 U.S. 579, 635 (1952).

1. The President's power to wage war Rests in the Constitution.

The President has power to wage war, once it is declared, by Article II of the United States Constitution. U.S. CONST. Art. 2 § 2; See also, U.S. CONST. Art. 1 § 8 (indicating that though the President has power to wage war, the Congress has the power to declare it). This power has been recognized by the Supreme Court. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (stating that the "President...possessed 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." The President's power to act in his capacity as Commander-in-Chief against al Qaeda is explicitly acknowledged and activated in the AUMF. AUMF, 115 Stat. 224 (2) (a) & (2) (b) (1). The Text of the AUMF states that "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." AUMF, 115 Stat. 224; See also 50 U.S.C. § 1547(a) (1) (declaring that the president can wage war when granted with specific statutory authorization such as that found in the AUMF). The AUMF permits "all necessary and appropriate force" against "organizations, or persons" responsible for the 9/11 attacks. AUMF, 115 Stat. 224 (2) (a). As

stated above, the Supreme Court has noted that al Qaeda was the organization responsible for the attacks on September 11, 2001. *Hamdi*, 542 U.S. at 509. As a result al Qaeda is "an entity with which the United States is at war." Thus the President has constitutional authority to act against al Qaeda.

2. Indefinite Detention is a Legal Incident of Waging War.

The use of indefinite detention for the duration of hostilities is an accepted and fundamental incident of war. *Hamdi*, 542 U.S. at 519. In *Hamdi*, the court was confronted with the constitutionality of the indefinite detention of an American citizen who had been apprehended while fighting on behalf of the Taliban in Afghanistan. *Id.* at 510. Though the AUMF granted no explicit statutory authority to the President to detain enemy combatants indefinitely, the court held that "the detention of individuals...for the duration of the conflict in which they were captured, 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." *Id.* at 518.

Because the president determined that Petitioner was an agent of the organization which perpetrated the 9/11 attacks, his constitutional authority granted pursuant to the AUMF and the War Powers resolution justifies the government's apprehension and detention of Ahmed as an enemy combatant

throughout the duration of the United States' conflict with the terrorist organization al Qaeda.

3. The Fifth Amendment's requirements of due process do not prevent the indefinite detention of individuals who have conspired with al Qaeda to perpetrate terrorist acts.

The Fifth Amendment's requirements of due process do not prevent the indefinite detention of individuals, such as Petitioner, who have conspired with al Qaeda to engage in terrorist actions. *Hamdi*, 542 U.S. at 533. Though the Fifth Amendment generally prohibits the detainment of individuals without due process, the *Hamdi* Court determined that the detention of enemy combatants "for the duration of the relevant hostilities" is constitutional. *Hamdi*, 542 U.S. at 519-521. The Court determined that, such detainment was appropriate in order to "prevent a combatant's return to the battlefield." Because returning Petitioner to his façade of a civilian life, in which he frequently contacted al Qaeda leaders and members and plotted terrorist activities would be detrimental to the President's mandate to prevent future terrorist acts, the *Hamdi* Court's opinion supports the detention of the Petitioner in order to prevent his return to the al Qaeda's battlefield of sleeper agents within the American Civilian population.

4. The President's Constitutional power to detain individuals conspiring with al Qaeda is supported by the Youngstown framework.

The President's power, including his war power, "is at its Zenith" when the President is acting pursuant to the will of Congress. *Youngstown*, 343 U.S. at 635. By identifying and detaining individuals who would perpetrate further terrorist acts, the President is doing exactly what he was mandated to do by the AUMF's charge to prevent another terrorist attack. AUMF, 115 Stat. 224. By submitting these individuals to military detention, the President is simply exercising the authority to use "all necessary and appropriate force" to prevent another attack. AUMF, 115 Stat. 224(2)(a). Since Congress explicitly gave the President authority to pursue terrorists and prevent further terrorist acts, his determinations of enemy combatants (such as Petitioner) and military detention of them is protected by the high deference of the Supreme Court's *Youngstown* framework.

Thus the AUMF authorizes the military detention of individuals, such as Petitioner, who have conspired to commit terrorist acts under al Qaeda as such detention is a fundamental incident to war as recognized by the Supreme Court. Furthermore, the Constitution permits such military detention under through

the war powers of the President which are augmented by the Supreme Court's *Youngstown* Doctrine.

II. THE TWELFTH CIRCUIT ERRED IN RULING THAT THE PROCESS AFFORDED PETITIONER WAS INSUFFICIENT BECAUSE PETITIONER RECEIVED ADEQUATE PROCESS DUE UNDER THE FIFTH AMENDMENT.

The Constitution of the United States establishes that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court plurality opinion in *Hamdi v. Rumsfeld* sets forth a three-part requirement to ensure detainees labeled as "enemy combatants" receive sufficient due process. The Twelfth Circuit erred in ruling that Petitioner received insufficient process when Petitioner was afforded the same process as used in *Hamdi* to contest his enemy-combatant designation through "a meaningful opportunity to contest the factual basis . . . before a neutral decisionmaker." 542 U.S. at 507.

A. THE DISTRICT COURT CORRECTLY APPLIED THE HAMDI FRAMEWORK.

In *Hamdi*, the Supreme Court stated, "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested." *Id.* at 509. In keeping this commitment, the *Hamdi* plurality looked to the *Mathews v. Eldridge* balancing test to levy the tension between the "matters of national security that might arise in an individual case" and

"constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." *Id.* at 539. Although Petitioner was not afforded the full procedural protections available, the District Court appropriately applied the safeguards outlined by the Hamdi plurality which ensured Petitioner's full Fifth Amendment rights.

1. The minimum standard of due process outlined in Hamdi is sufficient in this case to satisfy Petitioner's rights and the government's interests.

Although a "state of war is not a blank check for the President" the Supreme Court recognizes that the "exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.* at 533.

In *Hamdi*, the United States pleaded with the Court for an outcome in favor of higher national security, as the nation was at war with al Qaeda and still reeling from 9/11. *Id.* Besides just 9/11, al Qaeda's checklist included the 1993 World Trade Center bombing, the bombings of two United States embassies in Africa, and the declarations of war on the United States. On the other hand, the *Hamdi* detainee pleaded for full citizen procedural rights. *Id.* In solving this difficult case of

constitutional calculus, the Court relied on the *Mathews* balancing test which stated, "due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). After weighing the options, the Court sided with neither the government nor the detainee and chose a middle road. In analyzing the detainee's plea for process, the Supreme Court held that "we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure." *Hamdi*, 542 U.S. at 516. However, the Court ultimately held "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." *Id.* at 533.

Today, six years after *Hamdi*, the constitutional calculus is the same, as the United States is still at war with al Qaeda, and the threats to national security remain just as real. In the case at hand, the Court is once again asked to perform a balancing test between national security interests and individual rights. This court, in following the guidelines established by *Mathews*, will find that the Hamdi three-part framework allows the preservation of both the nation's freedom and the individual's Fifth Amendment rights.

2. The due process granted to Petitioner met the minimum standard outlined in Hamdi.

Under *Hamdi*, a citizen-detainee is entitled to a “meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” *Id.* at 509. In this case, the district court correctly applied the *Hamdi* framework and gave Petitioner the opportunity to refute his status as an enemy combatant, thus fulfilling Petitioner’s Fifth Amendment right to due process.

First of all, Petitioner received “notice of the factual basis for his classification,” *Id.* at 533, when the government compiled the Murphy Declaration, which consisted of detailed evidence suggesting that Petitioner was a sleeper agent for al Qaeda within the United States. (R at 8.) Petitioner was made aware of the allegations contained in the Murphy Declaration and knew that this piece of evidence was the factual basis for his detention. (R at 9.) The judge granted Petitioner sixty days to rebut the evidence with more persuasive evidence, which if he did, Petitioner would have received a full adversarial hearing. (R at 9.) This fulfills the second prong of the *Hamdi* framework of “a fair opportunity to rebut the Government’s factual assertions.” *Hamdi*, 542 U.S. at 533. However, Petitioner refused to present any evidence at all in his defense, and as such, the

district court dismissed Petitioner's writ of habeas corpus. (R at 10.)

The third requirement of the Hamdi framework is that Petitioner would have an opportunity to rebut the Government's assertions "before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533. The Hamdi plurality reasoned that a district court could easily fulfill this role as a "neutral decisionmaker" as it "would proceed with the caution that we have indicated is necessary in this setting, engaging in a fact finding process that is both prudent and incremental." *Id.* at 539. In this case, the district court habeas proceedings, (R at 10,) on behalf of Petitioner most certainly fulfill this role and "will pay proper heed both to the matters of national security . . . and to the constitutional limitations safeguarding essential liberties." *Hamdi*, 542 U.S. at 539.

B. THE PETITIONER IS NOT ENTITLED TO ANY GREATER PROCESS THAN THE DETAINEE IN HAMDI.

In today's world, courts are recognizing that "the laws of war, in their current form, were not designed to apply to transnational terrorism of the kind perpetrated by Al-Qaeda." Benjamin J. Priester, *Terrorist Detention: Directions for Reform*, 43 U. RICH. L. REV. 1021, 1044 (Mar. 2009). As a result, courts are reasoning that when it comes to classification of an enemy-combatant: "Transnational jihadi terrorism is here to

stay, and it will increasingly be fought away from any conventional battlefield.” Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed*, 33 YALE J. INT’L L. 369, 416 (Summer 2008). The Hamdi plurality recognized this shift in conventional warfare when it declared that “enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” *Hamdi*, 542 U.S. at 533. In this case, the threats of al Qaeda warfare in a domestic setting should be treated with the same standard as those posed by conflict on foreign battlefields. As such, Petitioner, as an enemy-combatant, should not be entitled to any more process than that afforded to the detainee in *Hamdi*.

1. The location of capture is not relevant to the procedures due a detainee.

The *Hamdi* plurality, as it offers the proper framework for balancing a detainee’s due process against national security interests, addresses the issue of “what process is constitutionally due to a citizen who disputes his enemy-combatant status.” *Id.* at 524. Although Petitioner submits that his capture upon American soil merits greater procedural safeguards than those afforded the detainee in *Hamdi* who was captured on a battlefield in Afghanistan, the *Hamdi* plurality makes no such distinction.

In *Hamdi*, the Court focused on what procedures would grant the "minimum requirements of due process" once a citizen was designated an "enemy combatant." *Id.* at 538. The Court reasoned that by "focusing their energies on the question of whether Hamdi was due an opportunity to rebut the Government's case against him," they had preserved his fundamental due process rights. *Id.* The *Hamdi* plurality was not concerned with the location of the capture, stating that "our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated." *Id.* at 531. Rather, the Court affirmed their focus on "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Id.*

In this case, Petitioner argues that he is more at risk for erroneous detainment due to the nature of his capture. However, just as in the *Hamdi* plurality, this court should focus on ensuring Petitioner receives the "minimum requirements of due process" *id.* at 538, once he is designated as an enemy combatant. Allowing extra procedural rights for Petitioner in this setting would heighten the "practical difficulties that would accompany a system of trial-like process" while causing unnecessary and dangerous distraction to those "engaged in the serious work of waging battle" against al Qaeda. *Id.* at 531-32.

By following the *Hamdi* framework, this court “would sufficiently address the ‘risk of an erroneous deprivation’ of a detainee’s liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.” *Id.* at 534 (citing *Mathews*, 424 U.S. at 335).

Petitioner is not entitled to any greater process than that afforded the detainee in *Hamdi*, as the nature of warfare and the traditional foreign battlefield has dramatically shifted to include the threat of terror on American soil by al Qaeda sleeper cells.

2. Following *Hamdi*, the court should appropriately admit the hearsay evidence and shift the burden of proof to Petitioner.

“In light of the burden on the Government” the *Hamdi* plurality recognized the “exigencies of the circumstances” surrounding al Qaeda warfare and held that “enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” *Hamdi*, 542 U.S. at 534. This standard of flexibility does not strip a habeas petitioner of his “opportunity to present and rebut facts,” but rather grants the court “some ability to vary the ways in which they do so as mandated by due process.” *Id.* at 526.

In *Hamdi*, the plurality held that where the Government put forth credible evidence showing the petitioner was an enemy combatant, a burden-shifting scheme where the "onus could shift to the petitioner to rebut that evidence" would not be unconstitutional. *Id.* at 534. While allowing the Government to shift this burden does run the "risk of an erroneous deprivation," the court reasoned that the petitioner, if mistakenly designated an enemy combatant, would have the opportunity to prove error in rebuttal. *Id.*

Likewise in the case at hand, once the United States has brought "credible evidence that the habeas petitioner meets the enemy-combatant criteria," the burden of proof should appropriately shift to Petitioner to rebut this evidence. Doing so will not violate the Fifth Amendment rights of Petitioner; rather, it will appropriately balance the interests of both parties. For policy reasons, this Court should allow the burden of proof to remain with Petitioner, as forcing the United States Government to carry the burden of proof would allow all al Qaeda sleeper cells residing within the United States to have free reign of terror without accountability.

In *Hamdi*, part of this "tailoring" meant accepting a hearsay document, the Mobbs Declaration, as the "most reliable available evidence from the Government." *Id.* The Court reasoned that because the document was created by a "knowledgeable

affiant," it could be accepted as "credible evidence" without jeopardizing the rights of the detainee so long as it "also permits the alleged combatant to present his own factual case to rebut the Government's return." *Id.* at 538. The *Hamdi* plurality expressed confidence that "courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." *Id.* at 539.

Likewise in the case at hand, the Murphy Declaration should be admitted as the "most reliable available evidence from the Government." *Id.* at 534. This does not mean that the United States must prove it is the "most reliable evidence" but rather that this document "may be accepted as the most reliable available evidence" when the "exigencies of the circumstances may demand that." *Id.* Allowing this flexible mechanism with regards to the evidence standard does not violate the three-part *Hamdi* framework; rather, it allows the United States' burden of protecting national security interests to be weighed against Petitioner's concerns over due process in a way that preserves the liberties of both interested parties.

CONCLUSION

For the foregoing reasons, this Court should find that the President had constitutional authority to detain Petitioner and that Petitioner was afforded sufficient due process.

Respectfully Submitted,

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