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Due Process Rights: Rendition of a Citizen Terrorist

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DUE PROCESS RIGHTS: RENDITION OF A CITIZEN TERRORIST

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I. INTRODUCTION

There are very few judicial opinions that discuss what procedural mechanisms must be provided to suspected terrorists in order to comport with their due process rights. Even fewer address the due process concerns inherent in rendition of a United States citizen suspected of terrorism. This paper, based on hypothetical facts and written in the form of a judicial opinion, addresses this

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issue. The facts in this opinion are wholly fictional, as they must be. The innately secretive nature of rendition prevents the facts of real renditions from emerging. Using a fictitious scenario, this paper examines the due process implications of rendering a U.S. citizen from one foreign jurisdiction to another.

This mock judicial opinion discusses the executive power to render a U.S. citizen living abroad to a foreign jurisdiction.[1] It reaches the conclusion that the President has the inherent power to render an American citizen to a foreign jurisdiction[2] and addresses substantive and procedural due process issues.[3] After determining that a substantive due process right exists, the opinion outlines the procedural elements required to comport with the procedural due process rights owed to the mock suspected terrorist, Joel Tuuri.[4]

1. *See infra* Part IV.
2. *See infra* Part IV. I reach the conclusion that the President has the inherent power to authorize a rendition in order to address the due process issues. The President's inherent power to authorize renditions warrants its own separate and complete analysis.
3. *See infra* Part V.
4. *See infra* Part V.B.

IN THE UNITED STATES DISTRICT COURT

Court File No. 123456

United States,

Plaintiff,

MEMORANDUM OPINION AND ORDER

v.

Joel Tuuri,

Defendant.

II. FACTS

Based on the record, the Court takes these facts[5] to be true for the purposes of this decision:

1. Joel Tuuri is a 35-year-old American citizen and a second-generation immigrant, his parents having emigrated from Finland to the United States shortly before his birth.

2. Tuuri lives in Barcelona, Spain and works for the U.S.-based corporation Technology Systems Inc.

3. Tuuri obtained his Bachelor of Science degree in Engineering at the University of Illinois at Chicago. He then obtained a Masters degree in Electrical

5. *See supra* Part I.

Engineering at Helsinki University of Technology.

4. Tuuri travels to Chicago bimonthly for work purposes and to visit his parents. He has maintained close ties to his Finish ancestry and generally travels to Finland two to three times a year.

5. American intelligence officials at the Central Intelligence Agency (CIA) discovered that Tuuri may be working for al Qaeda. Cell phone records show calls from Tuuri to known al Qaeda leaders.

6. Intelligence officials persuaded Technology Systems Inc. to allow them to scan documents off Tuuri's work computer. They successfully decoded a set of documents saved on Tuuri's computer that contained detailed instructions for detonating a bomb at an elevated train stop in downtown Chicago.

7. Based on this information, American intelligence officials deemed Tuuri to be a grave threat to national security and recommended he be detained and interrogated immediately.

8. Many of the documents and witnesses relevant to the CIA's investigation were located in Finland. The CIA contacted Spanish authorities to consult with them on transporting Tuuri to Finland for interrogation. The Spanish government was unwilling to hand Tuuri over to the Finish government.

9. Finish officials were unwilling to transport Tuuri from Spain without the consent of Spanish officials. However, Finish officials agreed to interrogate Tuuri if he was rendered to Finland.

10. The CIA took custody of Tuuri while he was at work in Barcelona. Tuuri was taken to a secret site in Spain, and the CIA made arrangements to render him from Spain to Finland.

11. Tuuri's counsel learned of the CIA's plans to render Tuuri to Finland and leaked the operation to Spanish authorities.

12. Tuuri's counsel then filed a habeas petition on his behalf in United States district court asserting that the proposed rendition was unconstitutional.

13. Tuuri is now being held at the U.S. Consulate in Barcelona.

The Court has also found:

1. The proposed rendition was a violation of Spanish and International law.

2. According to the U.S. Department of State, Finland has a nearly unblemished human rights record.[6] Therefore the Convention against Torture is not implicated by this rendition.[7]

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6. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES IN FINLAND (2006), http://www.state.gov/g/drl/rls/hrrpt/2006/78811.htm. The report states that the laws of Finland prohibit torture and other forms of cruel or degrading punishment. It also confirms that no reports of such practices by the Finnish Government arose in 2005. Furthermore, human rights groups investigated and published their findings without interference by the Finnish Government.

7. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. 100-20 (1988), 1465 U.N.T.S. 85. Article three of the Convention against Torture (CAT) states that individuals may not be rendered to another jurisdiction if there are "substantial grounds" for thinking that the rendered individuals will be subject to torture in the receiving country. *Id.* at part I, art. III. Allegations of violations of the CAT or general allegations of torture and inhumane treatment are raised in most court cases involving renditions. *See, e.g.*, El-Masri v. U.S., 479 F.3d 296, 300–01 (4th Cir. 2007); El-Masri v. Tenet, 437 F. Supp. 2d 530, 534–35 (E.D. Va. 2006); Arar v. Ashcroft, 414 F. Supp. 2d 250, 272–73 (E.D.N.Y. 2006). How one evaluates the legality of a proposed rendition under the CAT, and to what extent the CAT is integrated into U.S. law are questions that are beyond the scope of this paper. To preclude inquiry into these topics, Tuuri is being rendered to a country where substantial grounds do not exist for believing he will be subject to torture. For a more in-depth discussion of renditions and the CAT, see the following

3. The Government has stipulated that it will not be asserting the state secrets privilege or the Totten doctrine as affirmed in *Tenet v. Doe.*[8]

III. ISSUES

This case presents the issue of whether the executive branch of the United States Government has the authority to render an American citizen from one foreign jurisdiction to another, and, if so, what process is due to the accused before the rendition can occur. We hold that the President does have the authority to render individuals pursuant to his inherent powers.[9] We further determine that Tuuri is entitled to notice of the charges against him and a hearing to contest those charges before a neutral decision maker.

IV. AUTHORIZATION

A. *Authorization Under the AUMF*

The Authorization for Use of Military Force (AUMF) authorizes the President "to use all necessary and appropriate force" against countries, organizations, or persons that he determines were involved in the 9/11 attacks.[10] In *Hamdi v.*

articles: Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 GEO. IMMIGR. L.J. 213 (2006) (concluding that, in addition to diplomatic assurances, the U.S. Government is obligated to consider all evidence with regard to the likelihood of torture in a country); A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1 (2006) (stating that through the use of various techniques such as assurances and post-transfer monitoring the U.S. Government could lawfully engage in rendition); Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106 (describing the history of rendition and its transformation under the Bush administration).

8. 544 U.S. 1, 11 (2005) (affirming the Totten doctrine, which precludes judicial inquiry into covert espionage agreements).

9. *See infra* Part IV.B.

10. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat 224, 224 (2001).

Rumsfeld,[11] the plurality held that the Government had statutory authority to detain an enemy combatant under the AUMF when the individual was captured on the battlefield in Afghanistan.[12] However, the plurality did not interpret the AUMF as authorizing the detention of terrorism suspects who were captured outside the realm of a traditional war setting.[13]

Given the narrow holding in *Hamdi*, Tuuri's rendition cannot be authorized by the AUMF. Hamdi's detention qualifies as a traditional law of armed conflict capture because Hamdi was captured on the battlefield in Afghanistan while allegedly taking up arms against the United States.[14] Unlike Hamdi, Tuuri was not captured in a traditional combat setting, and detaining Tuuri does not serve the purpose of ensuring that he does not return to the battlefield.[15] While the detention does keep him from communicating with al Qaeda and carrying out the organization's plans, these activities do not constitute war waging in the traditional sense.[16] Because Tuuri was not captured in a traditional war setting, he cannot be classified as an enemy combatant. Therefore, the laws of war do not apply to Tuuri,[17] and the "necessary and appropriate force"[18] authorized under the AUMF cannot apply to him.[19] If the AUMF is meant to cover individuals

11. 542 U.S. 507 (2004).

12. *Id.* at 518.

13. *See id.* at 519 ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

14. *Id.* at 518 (explaining that individuals fighting against the United States as part of the Taliban, an organization known to have taken part in the 9/11 terrorist attacks, are people Congress meant to be included within the scope of the AUMF).

15. *See id.* ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.").

16. *See id.* at 517–18 (recognizing only a narrow category of individuals the President may detain pursuant to the AUMF: members of the Taliban associated with the 9/11 attacks).

17. *But see* John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L. L. 207, 215 (2003) (explaining the view that the conflict with al Qaeda does constitute a war even if it is not waged against state actors on a traditional battleground).

18. Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

19. The *Hamdi* Court did state that the traditional laws of war may become obsolete if the war on terrorism becomes unlike any of the traditional wars of the past waged on a set battlefield. 542 U.S. at 521. However, the traditional practice of waging war on the battlefield is still a part of the war on terrorism. *See id.*

such as Tuuri, captured far from any battlefield and outside the laws of war, then it is the task of Congress to clarify the intended scope of the authorization.[20] It is not the role of this Court to expand the AUMF's coverage.

B. Inherent Presidential Powers

Because the AUMF does not authorize Tuuri's rendition, we next turn to the President's inherent powers. We hold that under the President's commander-in-chief [21] and foreign policy powers he is able to authorize the rendition of an individual from one foreign jurisdiction to another.

In analyzing the President's inherent powers we turn first to the well-known Jackson categories, which explain that the extent of the President's power is often contingent on Congress's action or inaction.[22] When the President acts pursuant to Congress's express or implied authorization, he acts within his highest level of authority. [23] When the President acts in the face of congressional silence, the distribution of power between the government branches is unclear, and when the President acts in a way that is incompatible with the congressional will, his power is at its lowest point.[24] While the Jackson categories apply in many contexts, the President is traditionally given a great deal of discretion in the area of foreign affairs.[25]

In rendering Tuuri to Finland, the President is acting in an area where the distribution of power between the executive and legislative branches is uncertain.[26] While acting in this "zone of

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Therefore, the laws of war have not become obsolete and are still useful in ascertaining the legality of the detentions of alleged terrorists.

20. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2133 (2005) (encouraging additional congressional participation in clarifying the application of the AUMF to the various circumstances arising as part of the war on terrorism).

21. U.S. CONST. art. II, § 2, cl. 1.

22. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–40 (1952) (Jackson, J., concurring).

23. *Id.* at 635–37.

24. *Id.* at 637–38.

25. *See, e.g.*, United States v. Curtis-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (stating that in dealing with foreign affairs the President has a "delicate, plenary, and exclusive power").

26. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

twilight," the President is authorized in ordering the rendition.[27] Whether to render an individual from one foreign jurisdiction to another is, in essence, a foreign policy decision.[28] Also, because Tuuri's rendition is motivated by national security concerns, the President is acting within his commander-in-chief capacity in protecting our nation from the threat of terrorism.[29] Within these traditional spheres of executive power, courts have generally afforded the President a great degree of discretion. We therefore hold that the President may, pursuant to his inherent powers, render an individual from one foreign jurisdiction to another.

V. DUE PROCESS

Because we hold that the President has the power to order the rendition, we must determine whether Tuuri has a substantive due process interest. If Tuuri does have a cognizable liberty interest at stake, we will next consider what procedural mechanisms are constitutionally required.

A. Substantive Due Process

Substantive due process protects fundamental rights, such as the right to be free from unlawful imprisonment. Fundamental rights are inherently part of the conceptualization of liberty under

27. *See id.*; *see also* Bradley & Goldsmith, *supra* note 20, at 2096–97. Bradley and Goldsmith state that the AUMF should not be read as a blanket prohibition of executive actions that violate international law. *Id.* Congress's failure to authorize a certain detention under the AUMF does not preclude the action from falling into Jackson's middle category. *Id.* Therefore, while the U.S. Government would have violated international law if the proposed rendition had taken place, it would not necessarily have acted in a manner contrary to congressional intent as articulated in the AUMF. *See id.* at 2097.

28. *See Curtis-Wright*, 299 U.S. at 319 ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

29. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 580–81 (2004) (Thomas, J., dissenting) (emphasizing the importance of the unitary Executive in making national security and foreign policy decisions); *see also* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 516–17 (2002). Delahunty and Yoo argue that the President has plenary power under the Constitution to respond to terrorist attacks. *Id.* at 516. They contend that this broad view of inherent presidential powers is supported by the text, structure, and history of the Constitution, as well as the traditional practices of the executive office. *Id.* at 516–17.

the Fifth Amendment.[30] Tuuri clearly has a substantial and fundamental liberty interest at stake. The Government is seeking to render Tuuri to Finland where he will be detained and questioned.[31] It is unclear when and under what circumstances the Finish government would release him. Detention of an alleged terrorist for an unspecified period of time clearly implicates a liberty interest that cannot be infringed without due process of the law.[32]

The Government contends that no substantive due process interest is involved because it is Finland, not the United States, that would detain Tuuri. We do not agree. In *DeShaney v. Winnebago County Dept. of Social Services*, the Court stated that the Due Process Clause does not require the state to protect an individual's liberty against invasion by a private actor.[33] Instead, the clause serves as a limitation on the Government's power to act.[34] This dicta is the basis for the state-created danger doctrine, which states that if the Government affirmatively acts in a manner that places an individual in danger, a substantive due process right arises.[35]

Under the state-created danger doctrine, Tuuri's right to substantive due process is clearly implicated, even though Finland, and not the United States, would detain him.[36] Tuuri is not asking

30. *See* U.S. CONST. amend. V; Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (stating that the Due Process Clause contains a substantive component disallowing arbitrary government action); Jones v. United States, 463 U.S. 354, 361 (1983) (emphasizing that a state must have a constitutionally adequate purpose for confining an individual).

31. *See supra* Part II.

32. *Hamdi*, 542 U.S. at 529; al-Marri v. Wright, 487 F.3d 160, 175 (4th Cir. 2007), *reh'g granted*; Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 31 (D.D.C. 2004).

33. 489 U.S. 189, 195 (1989).

34. *Id.*

35. *See, e.g.*, Pena v. DePrisco, 432 F.3d 98, 109 (2d Cir. 2005) (distinguishing between passive and affirmative action in a state-created danger principle); Kneipp v. Tedder, 95 F.3d 1199, 1207 (3d Cir. 1996) (stating that liability under the state-created danger theory arises from affirmative acts); Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir. 1989) (examining the defendant's conduct to determine if he affirmatively placed the plaintiff in a position of danger).

36. *See Deshaney*, 489 U.S. at 196 (stating that the Fourteenth Amendment was designed to prevent the Government from inappropriately using its power); *Pena*, 432 F.3d at 109 (holding that when the State assists or encourages another to act it creates a danger); *see also* Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 739 n.368 (2006) (asserting that, while the state-created danger doctrine was developed within the context of 42 U.S.C. § 1983 lawsuits, the actual substance of the substantive due process

the Government to protect him from outside actors; he is asking the Government to refrain from actively participating in his rendition and detention. Undoubtedly, the Government has deprived Tuuri of a liberty interest, either indirectly through the state-created dangers doctrine or directly through its active involvement in the rendition process.[37]

B. Procedureal Due Process

Because Tuuri was deprived of a constitutionally recognized liberty interest, we must next determine what procedural due process elements are necessary to comport with the demands of due process. When the Government seeks to deprive an individual of his liberty, the court must put a fundamentally fair procedure in place to ensure that the taking of the interest is lawful.[38] We hold that the Government did not need to provide Tuuri with a preliminary hearing before taking him into U.S. custody in Spain. At the accused's capture, the Government must only inform the accused of the general nature of the charges against him.[39] However, before the United States can render an American citizen from one foreign jurisdiction to another, the accused must be granted a hearing.[40]

We determine what procedure will satisfy due process by examining *Hamdi* and other precedent analyzing the requisite due process measures. Past cases, particularly cases discussing the procedure due to parolees and prisoners, are illustrative of the type of procedures that may be required here.[41] We must also apply the

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protection is the same in the context of a habeas corpus review).

37. *See Deshaney*, 489 U.S. at 200.

38. Heller v. Doe, 509 U.S. 312, 332 (1993) (explaining that a procedure must be put in place that will minimize the risk of error); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due."); *In re* Gault, 387 U.S. 1, 20 (1967) ("Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.").

39. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (explaining that the process described in the court's opinion applies to situations where the Government continues to hold an individual, and does not apply to the initial capture).

40. *See id.* (stating that the basic due process afforded captured combatants applies only when the Government decides to continue to hold them in custody).

41. Because few national security cases have reached the due process

Eldridge balancing test to ascertain what procedures will be constitutionally required.[42]

Under the *Eldridge* balancing test, we consider the nature of the private interest that will be affected by Government action, the risk of erroneous deprivation, the probable value of additional procedural safeguards, and the Government interest.[43] We must implement a fair process to ensure the detention is lawful. Providing a fair process to the accused does not necessarily mean he will be afforded the "full panoply of rights" given to a criminal defendant.[44] Due process is a flexible concept, and what is required depends on the circumstances.[45]

There are several basic procedural elements that are generally required to afford an individual his due process rights. The requisite procedures may include a combination of the following elements: notice to the accused; a preliminary hearing; a hearing prior to the final deprivation of rights; and adjudication by a neutral decision maker.[46] While due process does not call for a hearing "in every conceivable case of government impairment of private interest," [47] the accused is generally entitled to a hearing before any significant and lasting deprivation of liberty.[48] This hearing may include an opportunity for the accused to be heard by the decision maker, to present evidence and witnesses on his own behalf, to confront unfavorable evidence, and to cross-examine

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question, prisoners' rights cases may constitute the most analogous precedent available from which to ascertain Tuuri's due process rights. This is because these cases also involved circumstances where both the individual and the Government had important interests at stake.

42. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

43. *Id.*

44. Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (finding that, where an individual is not subject to actual criminal prosecution, all of the rights due a criminal defendant do not necessarily apply).

45. *Id.* at 481; Cafeteria & Rest. Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.") (citation omitted).

46. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 564–65 (1974) (describing the procedural elements that due process requires before revoking a prisoner's good-time credits).

47. *Cafeteria*, 367 U.S. at 894.

48. *See Wolff*, 418 U.S. at 557–58 ("This [constitutional] analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.") (citation omitted).

witnesses.[49]

In the realm of national security, our task is to balance the seemingly incommensurable interests of the accused and those of the Government in order to determine what process is due under the Constitution.[50] In these cases, the accused clearly has a fundamental liberty interest at stake.[51] The Government also has strong interests in protecting our nation's security in the face of terrorism.[52] Because *Hamdi* is the only U.S. Supreme Court case that contains a detailed discussion of what procedure is due to an alleged terrorist, we begin with a brief summary of *Hamdi.* We next consider, in turn, each of the basic procedural elements listed above.

1. Hamdi v. Rumsfeld

Yaser Hamdi was an American citizen captured as an alleged enemy combatant on the battlefield in Afghanistan.[53] The Government asserted that it could justifiably hold Hamdi indefinitely, absent charges or proceedings, because of Hamdi's classification as an enemy combatant.[54] The plurality held that Hamdi was entitled to certain procedural due process protections including an opportunity to dispute his classification as an enemy combatant.[55] Specifically, the plurality found that a citizen detained as an enemy combatant must be given notice of the factual basis of the charges against him, and an opportunity to contest the Government's assertions before a neutral decision maker.[56]

2. Procedural Due Process Elements

Tuuri has a fundamental liberty interest in being free from detention.[57] However, the Government has an important need to

49. *E.g., Morrissey,* 408 U.S. at 489 (explaining the minimum hearing requirements that must be provided before revoking parole).

50. Hamdi v. Rumsfeld, 542 U.S. 507, 528 (2004).

51. *Id.* at 529.

52. *Id.* at 531.

53. *Id.* at 510.

54. *Id.* at 510–11; *see also* Brief for the Respondents in Opposition at 14, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), 2003 WL 23189498.

55. *Hamdi,* 542 U.S. at 533.

56. *Id.*

57. *See id.* at 529 ("Hamdi's "private interest . . . is the most elemental of

maintain national security.[58] With these considerations and the holding from *Hamdi* in mind, we next turn to each of the procedural elements that may be required to comport with Tuuri's procedural due process rights.

3. Preliminary Hearing

Whether a court must provide a preliminary hearing to the accused depends on the severity of the deprivation, as well as the magnitude of the government interest at stake that would be undermined by providing a preliminary hearing.[59] Past cases involving prisoners' rights and the revocation of public benefits shed light on when a preliminary hearing may be necessary.

In *Morrissey v. Brewer*, the Court held that due process required a prompt preliminary hearing to determine if there were reasonable grounds to revoke parole.[60] The Court stated that a preliminary hearing was necessary because immediate imprisonment would work a grievous loss on the accused.[61] In a case adjudicating the discontinuance of public assistance, the *Goldberg* Court also held that a preliminary hearing would be necessary because discontinuing an impoverished person's benefits would constitute a grievous loss.[62] By contrast, in *Wolff v. McDonnell*, the Court held that a formalized preliminary hearing was not constitutionally required.[63] Comparing its facts to those in *Morrissey*, the Court reasoned that an already imprisoned individual's loss of good-time credits was "not the same immediate disaster" as the revocation of parole.[64] Furthermore, the Court emphasized that prison procedures must be accommodated with the government's interest in promoting institutional safety.[65]

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liberty interests—the interest in being free from physical detention by one's own government.").

58. *See id.* at 531 ("On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.").

59. *See* Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 (1961)).

60. 408 U.S. 471, 485 (1972).

61. *Id.* at 482.

62. 397 U.S. at 264.

63. 418 U.S. 539, 561 (1974).

64. *Id.*

65. *Id.* at 562–63 (discussing the risks of retaliation that potentially accompany prison proceedings).

Under the present circumstances, a preliminary hearing would militate against the risk of erroneous deprivation. Nevertheless, we cannot say that such a hearing is constitutionally required. While the United States cannot render an American citizen from one foreign jurisdiction to another before granting the accused a hearing, we hold that the executive branch may take the accused into U.S. custody without affording him any process other than notice of the charges against him.

In reaching this conclusion, we look to the nature of Tuuri's personal interest and the nature of the governmental interest at stake. Much like the parolee in *Morrissey*, Tuuri has a fundamental liberty interest in being free from imprisonment, and clearly suffers a grievous loss by being immediately imprisoned upon his capture.[66] However, the burdens that would be placed on the Government if it were required to provide the accused with a hearing prior to capture are quite substantial. In contrast to the circumstances involved in *Goldberg v. Kelly*, these burdens are not merely administrative in nature.[67] Instead, as in *Wolff v. McDonnell*, important safety and security interests may be undermined by granting Tuuri a preliminary hearing.[68]

In the national security context, the *Hamdi* Court held that a preliminary hearing was not required, out of deference to the Government's interest in protecting national security.[69] The Court stated, "initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized."[70] As in *Hamdi*, the Government may take custody of Tuuri without providing him with a preliminary hearing on the merits.

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66. *See Morrissey*, 408 U.S. at 482 (noting that the parolee's liberty is valuable and should be construed within Fourteenth Amendment protection).

67. *See* 397 U.S. at 266 (stating that the welfare recipient's interests outweigh any increase in fiscal or administrative burdens for the State).

68. *See* 418 U.S. at 562 (describing some of the obstacles correctional institutions face in providing a safe environment for guards and inmates).

69. 542 U.S. 507, 533–34 (2004) (regarding the exigencies of ongoing military conflict and the burden on the Executive).

70. *Id.* at 534. A preliminary hearing would have been virtually impossible in *Hamdi* since the capture was made in the context of an armed conflict. *See id.* at 510 (noting that Hamdi was in Afghanistan during the U.S.-Taliban conflict). While those same practical obstacles to providing a preliminary hearing do not exist in Tuuri's case, there are nonetheless strong governmental interests at play that would potentially be undermined by providing Tuuri with an initial hearing.

4. Notice

To comport with due process, we must provide the accused with a form of notice that is reasonably calculated to inform him of the impending action and give him the opportunity to respond.[71] Therefore, the Government must provide Tuuri with prompt notice of the alleged terrorist acts with which he is charged so he has reasonable time to offer a rebuttal.[72] This notice must state the factual basis of the charge with sufficient specificity so Tuuri can mount an appropriate defense.[73] The notice need not include all of the facts that are relevant to the charge if certain pertinent facts would have a substantial likelihood of harming our national security. The Government will not be required to disclose these potentially harmful facts unless the accused needs that information to understand and defend against the allegations.

5. Neutral Decisionmaker

The right to a neutral decision maker is a basic procedural due process right.[74] However, this right does not necessarily entitle the accused to have a judicial officer hear his or her case.[75] What is essential is that the person or entity who hears the case is able to be impartial and neutral.[76] Given this issue of neutrality, we hold that the judiciary must retain the power to review habeas petitions from U.S. citizens who the Government seeks to render from one foreign jurisdiction to another.

In *Washington v. Harper*,[77] a prisoner challenged the legality of a prison policy that authorized administering antipsychotic drugs against the prisoner's will and without a judicial hearing.[78] The Court held that review by an administrative panel did comport with

71. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

72. *See Wolff*, 418 U.S. at 564 (holding that written notice of charges must be given to an inmate in a disciplinary action at least twenty-four hours prior to his Adjustment Committee appearance).

73. *See id.* (holding that this written notice will give the inmate time to prepare a defense).

74. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (asserting the essential nature of an impartial decision maker).

75. *See* Morrissey v. Brewer, 408 U.S. 471, 486 (1972) (holding that the decision maker should be independent but not necessarily a judicial officer).

76. *See id.* at 489 (describing the minimum requirements of due process).

77. 494 U.S. 210 (1990).

78. *Id.* at 217.

due process, reasoning that the prisoner's liberty interest is adequately protected by allowing medical professionals to make the decision.[79] In his dissenting opinion, Justice Stevens argued that a serious danger of institutional bias exists under the non-judicial hearing procedure.[80]

The *Washington* Court counterbalanced the issue of institutional bias against the fact that that doctors have a special relationship with their patients and must act in their best interests.[81] Military officers do not have a special relationship with their enemies, and other concerns likely overshadow the officers' consideration of their prisoners' best interests.[82] A decision maker acting as part of a military tribunal is primarily concerned with the institutional goal of optimizing our national security.[83] The officer's primary concern for our nation's security may cause him or her to give too much weight to the Government's safety concerns in a case contesting the legality of a Government rendition.[84]

The issue of institutional bias is a relevant concern in this case, and existence of a special relationship does not mitigate its harm.[85] The Government contends that if military tribunals offer the requisite procedural mechanisms, then those tribunals could adjudicate the rights of alleged terrorists without the need for habeas review by the courts. While it is possible that military tribunals could adhere to the requisite procedural standards, this should not limit the court's ability to review the decision if a writ of

79. *Id.* at 236.

80. *Id.* at 255 (Stevens, J., dissenting).

81. Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 405 (2006) (asserting that the Court was influenced by the technical nature of the determinations, and also by the relationship that should exist between a patient and medical professional) (citing Jennifer Russano, *Is Boutique Medicine a New Threat to American Health Care or a Logical Way of Revitalizing the Doctor-Patient Relationship?*, 17 WASH. U. J.L. & POL'Y 313, 330 n.11 (2005)).

82. *Id.*

83. *See* 78 AM. JUR. 2D *War* § 35 (2007) (explaining that military tribunals are used to confront those who deliberately attempt to thwart or impede military efforts).

84. Yin, *supra* note 81, at 405 (stating that a soldier's principal obligation is to protect his or her nation from the enemy).

85. *But see id.* (explaining that despite the lack of a special relationship between prison officials and prisoners, those officials serve as decision makers in a variety of contexts).

habeas corpus is filed.[86] Therefore, we hold that even if military tribunals comply with the procedural elements that are constitutionally required, the judicial system must retain the ability to hear cases on habeas review.

6. Hearing Procedures

The hearing must provide the accused with a fair opportunity to present his case, while also remaining sensitive to the important governmental interests involved.[87] To determine what hearing procedures must be provided, we analyze the holding in *Hamdi* and the reasoning from prisoner's rights cases. We hold that Tuuri is entitled to speak on his own behalf at the hearing.[88] The presiding court must also permit Tuuri to offer evidence, call witnesses, and cross-examine adverse witnesses subject to the Government's national security concerns.[89] The court must provide Tuuri with limited discovery mechanisms to obtain favorable evidence, unless the government interests are so strong as to make this unworkable. In order to carry out the rendition, the Government must prove, by clear and convincing evidence, that the accused has committed terrorist acts or is affiliated with a terrorist organization and planned to commit an act of terrorism.[90]

In *Morrissey*, the Court held that the parolee must be provided with an opportunity to be heard, present witnesses, and confront and cross-examine adverse witnesses except where the hearing officer finds good cause for disallowing the confrontation.[91] The *Wolff* Court held that an already incarcerated prisoner facing the revocation of good-time credits must be afforded the opportunity to put forth evidence, which included the right to call witnesses,

86. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

87. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests . . . affected.").

88. *See* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (deciding that the minimum requirements of due process include, *inter alia*, the opportunity to be heard in person at the hearing).

89. *See id.*

90. *See* Addington v. Texas, 441 U.S. 418, 427 (1979) (explaining that imposing a higher burden of proof is one way to guard against the risk of an erroneous deprivation of liberty).

91. 408 U.S. at 489.

when such actions would not jeopardize the institution's correctional goals or the prison's safety.[92] The *Wolff* Court did not find that confrontation or cross-examination were constitutionally required.[93] The Court reasoned that the full range of procedures in *Morrissey* was not constitutionally required in *Wolff* because of the "very different stake the State has in the structure and content of the prison discipline hearing."[94] The Court reasoned that it must not mandate procedures that would undermine the institution's formidable task of affording "reasonable personal safety for guards and inmates."[95]

The procedure that the Court held was constitutionally due in the prisoners' rights cases offers us guidance as we consider how to balance the personal and government interests to arrive at a workable result. It is true that some of the rationales offered in the prisoners' rights cases for limiting the rights of the accused do not apply to this case. For example, in prisoners' rights cases the Court often emphasizes the importance of implementing procedural mechanisms that comport with the institution's penological or rehabilitative goals.[96] However, with respect to suspected terrorists, penological or rehabilitative considerations are generally not the focus. In this context, the goal to be achieved by detention is not rehabilitation of the suspect; instead, the goal is to debilitate terrorist networks by imprisoning individuals suspected of working to further the goals of terrorist organizations like al Qaeda.[97] Though Tuuri's detention is not authorized under the traditional laws of war,[98] the nature of the detention is more analogous to capturing an enemy soldier so that he may no longer engage in combat than it is to civilian imprisonment with its array of penological and rehabilitative goals.[99]

Some of the institutional safety goals in the prisoners' rights

92. 418 U.S. 539, 566 (1974).

93. *Id.* at 567–68 (explaining that the rights of confrontation and cross-examination are not considered "universally applicable to all hearings").

94. *Id.* at 561.

95. *Id.* at 562.

96. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 224 (1990); *Wolff*, 418 U.S. at 562–63; Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973).

97. Yin, *supra* note 81, at 411–12 (stating that a detention in accordance with the laws of war has no penological justification).

98. *See supra* Part IV.A.

99. *See Yin, supra* note 81, at 411–12.

cases are analogous to the broader concerns for national security presented in this case. For example, allowing an alleged terrorist access to discovery mechanisms may implicate the Government's national security concerns. If the accused is allowed to engage in a detailed discovery process, this may unduly burden the Government administratively.[100] A detailed discovery process could lead to national security problems if intelligence information is disclosed for litigation purposes and then leaked to terrorist organizations or to the public at large.[101] A reluctance to so burden the Government led the *Hamdi* Court to reject the trial court's conclusion that the accused should be afforded access to extensive discovery mechanisms.[102] However, it is appropriate to afford Tuuri an opportunity for discovery that is contingent on the Government's legitimate need to keep information confidential. Therefore, to accommodate the interests of the individual and the Government, the court will allow the accused to engage in limited discovery, subject to the Government's national security concerns.

a. Evidentiary Standard

The Government contends that the "some evidence standard" should be the burden of proof used in Tuuri's hearing.[103] The Government reasons that while the Court found this standard was constitutionally deficient in *Hamdi*,[104] it is appropriate here due to the seriousness of the allegations against Tuuri. Hamdi was allegedly a foot solider for al Qaeda, fighting as a member of a Taliban unit.[105] By contrast, Tuuri has allegedly communicated regularly with al Qaeda leaders and was formulating a plan to detonate a bomb in a major metropolitan area.[106] While we recognize the Government's legitimate national security concerns, we maintain that the "some evidence standard" is nevertheless inappropriate.[107]

100. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004).
101. *See id.* at 532 (recognizing that the discovery process of the accused may result in the distraction of military personnel engaged in war and unnecessarily intrude on national security secrets).
102. *See id.*
103. *See id.* at 527.
104. *Id.* at 537.
105. *Id.* at 512–13.
106. *See supra* Part II.
107. *See Hamdi*, 542 U.S. at 537 (explaining that the "some evidence" standard

The Government next contends that if the "some evidence" standard is impermissible, a preponderance of the evidence standard should be used to determine if Tuuri can be legally rendered to Finland. Under the circumstances, we find the preponderance of the evidence standard of proof to be constitutionally deficient.[108] Tuuri's ability to engage in discovery, offer evidence, call and cross-examine witnesses could be limited to accommodate the governmental interests at stake. Pairing these potential limitations with a preponderance of the evidence standard would tip the scale too far in favor of the Government at the expense of the individual's constitutional rights.[109] Instead, there shall be no presumption in favor of either party. The evaluating court must find, by clear and convincing evidence, that Tuuri has engaged in the alleged terrorist act or is part of a terrorist network, and planned to commit an illegal act, before he may be rendered to Finland for detention and interrogation.[110]

VI. CONCLUSION

The President has the inherent authority to render Tuuri from Spain to Finland.[111] Nevertheless, the Government's proposed action must comport with Tuuri's right to due process.[112] We hold that to comport with due process, Tuuri must be afforded notice and a hearing where he will have the opportunity to be heard by a

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is generally used as a standard of review, not as a standard of proof).

108. *See* Sandosky v. Kramer, 455 U.S. 745, 756 (1982) (explaining that a clear and convincing evidence standard is required to maintain fundamental fairness when the individual is threatened with a substantial deprivation of liberty).

109. *See id.* at 763–64. The Court in *Sandosky* explained that in termination of parental rights cases the State is in a much better position to put forth its case than the parent is in to prepare a defense. The State generally has greater access to resources, experts, and witnesses. These factors, when paired with a preponderance of the evidence standard of proof, produce an unacceptably high risk of erroneous deprivation of a constitutionally protected right. *Id.* In Tuuri's case, similar concerns are implicated, albeit in a very different context. National security concerns may preclude several procedural rights normally due to the accused. The absence of these procedural elements, when coupled with a preponderance of the evidence standard, would impose an unfair disadvantage on the accused. The resulting risk of erroneous deprivation is too high to pass constitutional muster. *See id.* at 764.

110. *See* Addington v. Texas, 441 U.S. 418, 431 (1979).

111. *See supra* Part IV.B.

112. *See supra* Part V.

neutral decision maker.[113]

A subsequent hearing date will be set based on an order to be provided to the parties.

VII. ARTICLE CONCLUSION

This article presents some of the issues that would likely be raised by a court in its analysis of a suspected terrorist's due process rights. While there are few actual judicial opinions that attempt to address this topic, I have relied upon the various opinions which address the substantive and procedural due process rights necessarily implicated by imprisonment and detention. In writing this article, I have done nothing more than made a modest attempt to explore these complex issues. However, given the strong personal and governmental interests at stake in the national security law context, any due process determination will require careful balancing and nuanced analysis of: (1) the inherent powers of the Executive; (2) the security interest of the Government; (3) the liberty interests of the accused; and (4) analogous case law. After a thorough analysis of these components, I conclude that, even if the President has the inherent authority to render a suspected terrorist to a foreign jurisdiction, the suspect is entitled to notice of the charges against him or her and a hearing to contest those charges before a neutral decision maker.

113. *See supra* Part V.B.