

No. 08-11144

IN THE
Supreme Court of the United States

**BURHAN UDDIN AHMED,
PETITIONER,**

v.

**UNITED STATES OF AMERICA,
RESPONDENT.**

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

PETITION FOR A WRIT OF CERTIORARI

**RECORD OF THE
AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY
2010 CONSTANCE BAKER MOTLEY NATIONAL MOOT COURT COMPETITION
IN CONSTITUTIONAL LAW**

(ORDER LIST: ____ U.S.)

OCTOBER 2, 2009

CERTIORARI GRANTED

08-11144 AHMED v. UNITED STATES

The petitions for writs of certiorari filed by Burhan Uddin Ahmed and the United States of America are granted and set for briefing and oral argument on these two questions:

Questions Presented:

1. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorizes, and if so whether the Constitution allows, the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?
2. Whether the process afforded by the district court to challenge a designation as an “enemy combatant” was sufficient under the requirements of the Fifth Amendment?

The briefs of the parties, not to exceed 30 pages, are to be filed with the Clerk according to the competition rules on or before January 15, 2010. No reply briefs are permitted.

The case is set for oral argument in the spring of 2010; date and location to be assigned. A total of 60 minutes is allotted for oral argument.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in 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.

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

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title.

This joint resolution may be cited as the "Authorization for Use of Military Force".

Section 2. Authorization for Use of the United States Armed Forces.

(a) In General. That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or

persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution 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 supersedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

STIPULATIONS

1. All documents contained in the Record are to be used for Moot Court purposes only. They are not to be cited or used as a reference in any other context.
2. Competitors must comply with all rules set forth for the American Constitution Society for Law and Policy 2010 Constance Baker Motley National Moot Court Competition in Constitutional Law. The rules can be found on the ACS website at www.acslaw.org.
3. For purposes of this competition, Burhan Uddin Ahmed shall be considered the “petitioner” and the United States of America shall be considered the “respondent.”
4. The two Questions Presented are the two issues on appeal for the purposes of this competition. **No other issues are presented in this appeal.** The parties may not argue jurisdiction, standing, or ripeness.
5. Competitors should note the procedural posture of the case. They should take care to argue only matters appropriately before the Supreme Court at this stage.
6. The facts presented and people named in the problem are fictionalized, but they are based on actual events and cases. For purposes of the competition, the only facts that may be argued are those contained in this Record, and everything stated in the Record should be assumed to be true. Competitors may not bring in additional facts to confirm, refute, or supplement what is in the Record.
7. Competitors are encouraged to research the law further. **However, competitors may not cite any judicial opinion, law review article, journal article, or other document or source of law published after July 31, 2009, and should disregard any changes to the law that may occurred after this date.**

* * *

**United States Court of Appeals
Twelfth Circuit**

Burhan Uddin Ahmed, Appellant

v.

United States of America, Appellee

Docket No. 06-9701

Argued: January 16, 2008

Decided: November 24, 2008

Before Morrison, Chief Circuit Judge, and Gray, Molina, Watts, Rivera, Baker, and Chen, Circuit Judges.

Judge Watts announced the judgment of the court and delivered an opinion, in which Chief Judge Morrison and Judges Baker and Chen joined Parts I, II, and III.

Judge Gray filed an opinion concurring in the judgment, in which Judges Molina and Rivera joined.

Chief Judge Morrison filed an opinion concurring in part and dissenting in part, in which Judges Baker and Chen joined.

Watts, Circuit Judge:

Burhan Uddin Ahmed filed a petition for a writ of habeas corpus challenging his military detention as an “enemy combatant.” The United States District Court for the District of East Dakota dismissed Ahmed’s petition, and he filed this appeal. A panel of this court affirmed the district court’s ruling. Upon Ahmed’s motion for rehearing, the court voted to vacate the panel opinion and hear the case en banc. Ahmed raises two issues that we are considering in this appeal: (1) assuming the government’s allegations are true, does the President have the authority to designate Ahmed, a legal immigrant, as an “enemy combatant” and subject him to indefinite military detention; and (2) if so, was the process afforded to Ahmed by the district court to

challenge his designation as an enemy combatant sufficient under the requirements of the Fifth Amendment?

This appeal raises fundamental questions about our national security and the basic rights guaranteed by the Constitution to persons lawfully residing in the United States. We have undertaken our duty to review the issues presented here with great care and respect for the important arguments raised by Ahmed and by the government. Having reviewed the proceedings before the district court, the proceedings before a panel of this court, and each party's arguments, we now hold: (1) the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), which is Congress's joint resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11, 2001, al Qaeda terrorist attacks, empowered the President to detain Ahmed as an enemy combatant; and (2) Ahmed was not afforded sufficient process to challenge his designation as an enemy combatant.

Accordingly, the judgment of the district court is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

I. BACKGROUND

A. Facts

On September 11, 2001, the al Qaeda terrorist network hijacked commercial airliners and used them as guided missiles to attack prominent targets in the United States. Nearly 3,000 people perished in these attacks. A week later, Congress responded by passing a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." AUMF, 115 Stat. 224.

Appellant Burhan Uddin Ahmed, a citizen of Pakistan, lawfully entered the United States with his family on September 8, 2001, to pursue a doctor of veterinary medicine degree at Wilson University in Wilson, East Dakota. Four months later, on January 3, 2002, federal agents arrested Ahmed in Wilson as a material witness in the government's investigation of the 9/11 attacks. Ahmed was detained in Wilson.

In November 2002, Ahmed was charged in the District of East Dakota with the possession of counterfeit Social Security cards with the intent to defraud. In January 2003, Ahmed was further charged with making a false statement to the FBI. Ahmed pleaded not guilty to all charges. The district court set a July 17, 2003, trial date. On June 9, 2003, the court scheduled a hearing for June 15, 2003, on all pretrial motions, including a motion to suppress evidence that Ahmed asserted was obtained by torture. On June 13, 2003, the government filed an ex parte motion to dismiss the indictment based on an order signed that morning by the President of the United States.

The President's order stated that he had "DETERMINED for the United States of America that" Ahmed: (1) is an enemy combatant; (2) is closely associated with al Qaeda; (3) "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism"; (4) "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda"; and (5) "represents a continuing, present, and grave danger to the national security of the United States." The President further determined that Ahmed's detention by the military was "necessary to prevent him from aiding al Qaeda." He thus ordered the Attorney General to surrender Ahmed to the Secretary of Defense, and directed the Secretary of Defense to "detain him as an enemy combatant." The District of East Dakota granted the government's motion to dismiss the criminal charges against Ahmed, and Ahmed

was then transferred to military custody and brought to the Army Regional Consolidated Detention Facility in Souda, East Dakota. Since that time, the military has held Ahmed as an enemy combatant without charge or trial. He has been given no indication as to when his detention will end.

B. Procedural Posture

Following his transfer to the Army Regional Consolidated Detention Facility, Ahmed filed a petition for a writ of habeas corpus in the District of East Dakota under 28 U.S.C. § 2241 to secure his release from military detention. The petition asserted that Ahmed's detention as an enemy combatant was unlawful and that the government must either file criminal charges against him or release him. Alternatively, the petition argued that Ahmed must be afforded a hearing to challenge the factual basis for his designation as an enemy combatant.

The government opposed his release, claiming Ahmed is an al Qaeda affiliate who "prepar[ed] for acts of international terrorism." The government asserts that the President has both statutory authority under the AUMF and inherent constitutional authority to indefinitely detain Ahmed or anyone else who associates with al Qaeda and "prepare[s]" for terrorist acts. In addition, the government asserts that Ahmed was given adequate process to challenge his detention.

The government provided the court with a hearsay document, the Declaration of John R. Murphy (Murphy Declaration),¹ who is the Director of the Joint Task Force for Combating Terrorism, detailing Ahmed's involvement with al Qaeda. In his declaration, Murphy reviewed the intelligence gathered by the government suggesting that Ahmed was an operative of al Qaeda acting as a sleeper agent within the United States; that he had been trained in a terrorist training

¹ A copy of the declaration is attached as Appendix A.

camp in Afghanistan; that he had communicated with Osama Bin Laden and was aided by other known high-ranking members of al Qaeda; that he entered the United States with the intent to commit terrorist attacks within the country; and that he possesses highly valuable intelligence about al Qaeda.

After considering the available evidence, the district court agreed that Ahmed could be detained as an enemy combatant, but found that he was entitled to challenge the factual basis of his detention at a hearing consistent with his procedural due process rights. The district court sent the case to a magistrate judge to determine the process that Ahmed must be afforded. The magistrate judge rejected Ahmed's argument that he had a right to procedural safeguards substantially equivalent to those criminal defendants receive. Instead, the magistrate judge determined that the government must provide Ahmed with notice of the factual basis of his detention, and that if the government could produce credible evidence supporting his designation as an enemy combatant, the burden would shift to Ahmed to refute this designation with more persuasive evidence. If Ahmed could produce such evidence, the government must either release him or agree to a full adversarial hearing with more robust procedural safeguards.

Within the framework provided by these procedures, the magistrate judge considered the Murphy Declaration, concluding that it provided Ahmed with adequate notice of the factual basis for his detention and offered sufficient evidence indicating that Ahmed was an enemy combatant to put the onus on Ahmed to produce more persuasive evidence refuting this determination. The magistrate judge allowed Ahmed 60 days to present rebuttal evidence.

Ahmed responded with a general denial. He asserted that he was not an enemy combatant, but refused to offer any evidence to rebut the Murphy Declaration, insisting that the procedures adopted by the magistrate judge were unconstitutional, and that he should not be

forced to prove his own innocence. Based on Ahmed's refusal to present evidence in his defense, the magistrate judge recommended that his petition for a writ of habeas corpus be dismissed. The district court agreed, and Ahmed's petition was dismissed.

Ahmed appealed the district court's decision dismissing his habeas petition, and a panel of this court affirmed the district court's dismissal. Upon Ahmed's motion for rehearing, the court voted to vacate the panel opinion and hear the case en banc. We now consider Ahmed's challenge to the President's authority to designate him an enemy combatant and indefinitely detain him, and his argument that the procedures afforded him below did not provide him with a meaningful opportunity to contest his enemy combatant status.

II. STANDARD OF REVIEW

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

III. AUTHORITY OF THE PRESIDENT TO DETAIN AHMED AS AN ENEMY COMBATANT

The first question this court must confront is whether the President has the legal authority to detain Ahmed as an enemy combatant in our conflict with al Qaeda, even though Ahmed had legally entered and was living in our country at the time he was seized. Ahmed asserts that the President lacks legal authority, either under the AUMF or under the Constitution, to designate and detain him as an enemy combatant because he was taken into custody in the United States, where he was lawfully residing, and had therefore achieved "civilian" status with its accompanying rights to full criminal process for his alleged wrongdoing. The government argues that both the AUMF and the President's inherent constitutional authority allowed for the detention.

A. The President's Power to Detain Enemy Combatants Under the AUMF

As a general matter, the Constitution affords all persons detained by the government the right to be charged and tried in a criminal proceeding for suspected wrongdoing, and it prohibits the government from subjecting individuals arrested inside the United States to military detention unless they fall within certain narrow exceptions. *See United States v. Salerno*, 481 U.S. 739, 755 (1987) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”). One of these exceptions is the detention of enemy combatants during military hostilities. When a person is properly designated as an enemy combatant pursuant to legal authority of the President, the person may be detained without charge or criminal proceedings “for the duration of the relevant hostilities.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 519-21 (2004).

The first time that the Supreme Court considered the breadth of the AUMF's grant of authority to detain enemy combatants was in *Hamdi v. Rumsfeld*. Hamdi was captured by U.S. allies in Afghanistan and turned over to our military there. *Id.* at 510. When it was discovered that he was a U.S. citizen by birth, Hamdi was transported to the United States for continued detention here. *Id.* In considering his detention, the Supreme Court ruled that “individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the 9/11] attacks, are individuals Congress sought to target in passing the AUMF.” *Id.* at 518. Although the language of the AUMF did not explicitly authorize detention, the *Hamdi* plurality “conclude[d] that detention of individuals falling into the limited category we are considering, 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 the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.*; *see also 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.”).

The *Hamdi* plurality recognized that Hamdi was “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there,” *id.* at 516 (internal quotation marks omitted), and, as a result, concluded that he clearly fell within the legal category of those “enemy combatants” who may be detained, even though he was a U.S. citizen and was being detained in this country. To further support the point that Hamdi’s citizenship did not prohibit his detention as an enemy combatant, the *Hamdi* plurality cited the Court’s precedent in *Ex parte Quirin*, 317 U.S. 1 (1942), which “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 within the meaning of . . . the law of war.’” *Hamdi*, 542 U.S. at 519 (quoting *Quirin*, 317 U.S. at 37-38).

Other courts have also considered the scope of the AUMF in different contexts. In *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), the Fourth Circuit held that the AUMF was broad enough to authorize the military detention of Jose Padilla, “a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.” *Id.* at 389. The Fourth Circuit relied on the Supreme Court’s decision in *Quirin*, which dealt with “the military trial of Haupt, a United States citizen who entered th[is] country with orders from the Nazis to blow up domestic

war facilities but was captured before he could execute those orders.” *Id.* at 392. “Like Haupt, Padilla associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil.” *Id.* As a result, the Fourth Circuit held that Padilla “falls within *Quirin*’s definition of enemy belligerent, as well as within the definition of the equivalent term [enemy combatant] accepted by the plurality in *Hamdi*.” *Id.* The Fourth Circuit concluded,

The Congress of the United States, in the Authorization for Use of Military Force Joint Resolution, provided the President all powers necessary and appropriate to protect American citizens from terrorist acts by those who attacked the United States on September 11, 2001. As would be expected, and as the Supreme Court has held, those powers include the power to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, and who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil – a power without which, Congress understood, the President could well be unable to protect American citizens from the very kind of savage attack that occurred four years ago almost to the day.

Id. at 397. Based on this, the court of appeals reversed the district court’s determination that the detention of Padilla by the President was without legal support, and ordered additional proceedings by the district court. Both *Hamdi* and *Padilla* make it abundantly clear that the President is authorized by the AUMF to detain enemy combatants who have taken up arms against the United States in support of a country or government that is our enemy.

B. Applicability of the AUMF to al Qaeda

This case presents a new issue that we must consider, namely whether the authority to detain under the AUMF extends to Ahmed as a member of al Qaeda, even though he did not take up arms against the United States in Afghanistan or in league with the Taliban. Because the alleged enemy combatants in *Hamdi* and *Padilla* were affiliated with the military arm of an enemy government, specifically the Taliban government of Afghanistan, neither court had to

confront whether their affiliation with al Qaeda and, in the case of Padilla, the mission to carry out additional terrorist acts within this country, would also have supported their detention as enemy combatants. We believe, however, that there is no question that persons associated with al Qaeda, the organization known to have carried out the 9/11 attacks against the United States, who were sent here as sleeper agents and terrorist operatives charged with committing additional attacks upon our homeland “are individuals Congress sought to target in passing the AUMF.” *Hamdi*, 542 U.S. at 518.

Emphasizing the right of the United States “to protect United States citizens both at home and abroad,” the AUMF authorized the President’s use of “all necessary and appropriate force against” the nations and organizations that “planned, authorized, committed, or aided” the 9/11 attacks, “or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.” AUMF, 115 Stat. 224. We think it is clear that Congress meant to authorize military retaliation against a reigning foreign government known to have supported the enemy force that attacked our country, as well as military action against al Qaeda operatives who, like the 9/11 hijackers, were sent by the al Qaeda organization to the United States to conduct additional terror operations here.

The government quite rightly points out that it was the 9/11 attacks that triggered the passage of the AUMF. And it is now known that the 9/11 attackers entered this country under false pretenses for the purpose of carrying out al Qaeda orders and, while finalizing the preparations for these attacks, lived without incident or notice until they boarded the commercial airliners that they used as weapons. Given the timeline of events, the 9/11 attackers did not engage in combat operations against our forces on a foreign battlefield. Even so, Ahmed argues that Congress’s grant of military authority to the President to deal with those responsible for the

9/11 attacks did not include an authorization for the President to deal militarily with al Qaeda operatives similarly situated to the 9/11 hijackers. We do not see anything in the language of the AUMF that limits the President's authorization in this way, and, indeed, 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.

Ahmed also argues that because al Qaeda itself is an international terrorist organization instead of a "nation state" or "enemy government," the AUMF cannot apply, consistent with the laws of war and our constitutional guarantees, to persons affiliated with the organization. We do not agree with the premise underlying this argument that al Qaeda's lack of control over an enemy nation or its government requires that it be considered nothing other than a criminal organization whose members would be entitled to the protections and procedures granted by the Constitution. To equate al Qaeda with a criminal organization is to not give it full credit for its scope and the danger it poses. Al Qaeda may be an unconventional enemy force in a historical context, but that does not make it any less of an enemy force. Given the integration of al Qaeda and the Taliban in Afghanistan, it makes little sense to say that we are legitimately at war with the Taliban, but we cannot be at war with al Qaeda.

Although the conflict we are currently fighting has noticeable differences from wars of the past, we are clearly fighting an enemy that declared war on us by staging a dramatic strike against our country. *See Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) (noting that "[t]he unconventional aspects of the present struggle do not make its stakes any less grave"); *Padilla*, 423 F.3d at 389 (noting that al Qaeda is "an entity with which the United States is at war"). We should not be distracted by superficial differences between al Qaeda and other enemies we have faced. Al Qaeda has members from different countries who are positioned

globally. It fights us with conventional weapons in Afghanistan, but its members have also infiltrated our borders and those of our allies with the goal of sabotage and other war-like acts targeting both military and civilian installations and citizens. The organization clearly resembles some of the multi-national forces that the United States and its allies have confronted in the past. And when al Qaeda members cross our borders with the intent to attack civilians in our country, they are not appreciably different from the soldiers in *Quirin*, who infiltrated our borders to commit acts of sabotage. Under these circumstances, it simply does not matter that “they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.” *Quirin*, 317 U.S. at 38. When they enter this country “with hostile purpose,” they are enemy belligerents subject to detention. *Id.*

Based on our reading of the laws of war, and given the context in which the AUMF was passed, we cannot conclude that President’s authority to militarily detain soldiers or saboteurs as enemy combatants is limited to those who are part of a formal military arm of a foreign nation or enemy government. Indeed, the AUMF plainly authorizes the President to use all necessary and appropriate force against al Qaeda. We believe that this must include the detention of al Qaeda operatives who associate with the enemy – whether it is the al Qaeda organization or the Taliban government – because these operatives with “aid, guidance and direction enter this country bent on hostile acts.” *Id.* at 37-38.

Ahmed argues that the Supreme Court’s holding in *Ex Parte Milligan*, 71 U.S. 2 (1866), compels the opposite conclusion. In *Milligan*, at the time of the Civil War, Lambdin P. Milligan and four other members of a secret organization were detained for planning to steal Union weapons in order to advance the Confederate cause. The Court held that they should be tried by civilian courts rather than by military tribunals. But there is a critical difference that makes

Milligan inapposite here, namely that Congress never authorized the use of force against the organization in that case. *See Milligan*, 71 U.S. at 6. In contrast, Congress did expressly authorize the use of force against al Qaeda. *See AUMF*, 115 Stat. 224. Moreover, the holding in *Milligan* applied after a determination had already been made that the individual in question could not be classified as an “enemy combatant.” *See Quirin*, 317 U.S. at 45. As discussed below, Ahmed clearly qualifies as an enemy combatant under the AUMF, so the holding in *Milligan* would not even be relevant here.

We disagree with Ahmed’s assertion about the import of *Milligan*, and in light of the other cases discussed so far, we believe that the AUMF does grant the President the authority to detain enemy combatants who associate themselves “with al Qaeda, an entity with which the United States is at war,” and “travel[] to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets,” even though the government cannot establish that the combatant also “took up arms on behalf of that enemy and against our country in a foreign combat zone of that war.” *Padilla*, 423 F.3d at 389.

C. The President’s Inherent Constitutional Power

Given the clarity of the authorization set forth in the AUMF,² we do not devote too much time to determining whether the President has, by virtue of the powers granted in the

² Despite the broad congressional authorization provided in the AUMF, Ahmed argues that Congress later limited the President’s power to detain terrorist aliens when it passed the 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 (Patriot Act). The Patriot Act, passed shortly after the AUMF, allows for short-term detention of terrorist aliens, Patriot Act § 412(a), but prohibits “indefinite detention.” Instead, it requires that “not later than 7 days after the commencement of such detention,” the Attorney General must either (1) begin “removal proceedings” or (2) “charge the alien with a criminal offense.” *Id.* The Patriot Act does permit an extension of “additional periods of up to six months” if removal is “unlikely for the reasonably foreseeable future” and the alien’s release “will threaten the national security of the United States or the safety of the community or any person.” *Id.*

Ahmed asserts that the more specific provisions of the Patriot Act regarding detentions govern the more general authorization found in the AUMF. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (“[N]ormally the specific governs the general.”). This maxim does not apply here, however, because two provisions deal with different powers of the President. Specifically, § 412 of the Patriot Act refers to the President’s power,

Constitution, the inherent authority to detain Ahmed or other enemy combatants. We simply note that the President has some inherent power under Article II to wage war, *see, e.g., 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.”). Furthermore, the Supreme Court has stated that military detention is a “fundamental incident of waging war,” *Hamdi*, 542 U.S. at 519, and there is nothing in the Constitution that forbids the President, who is acting with the express consent of the Congress, from declaring an individual associated with an organization that has undertaken acts of war against the United States to be an enemy combatant. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting Presidential power is “at its maximum” when the President operates with Congressional authorization).

Setting forth the full contours of the power that stems from this basic authority is a complex undertaking that is unnecessary for the present purposes. We think it is sufficient to highlight that the Constitution provides a basis for, and does not undermine, the President’s actions here.

D. Designation of Ahmed as an Enemy Combatant

In light of the foregoing, and if the allegations contained in the Murphy Declaration are true, we believe that Ahmed falls within the category of persons who may be lawfully detained pursuant to the authority granted by the AUMF. In the case of Ahmed, according to Murphy, his

under Article II § 3, to “take Care that the Laws be faithfully executed,” U.S. Const., art. II, § 3, and not the President’s separate Commander-in-Chief power. *See* Article II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”). The Patriot Act gives instruction to the President’s agent, the Attorney General, regarding implementation of the immigration code and does not purport to limit the President’s Commander-in-Chief power. So whatever limitations are present in the Patriot Act do not restrict the separate and distinct grant of power given by the AUMF.

reason for coming to the United States – to pursue higher education – was a façade. He was not a serious student given his regular absences from class and his failing status after his first semester. He had clear association with and allegiance to al Qaeda’s mission, and was taking steps to support it. Although a civilian, his actions were not those of a common criminal who was intending to commit criminal act for personal gain. Instead, he was taking steps to associate with and receive training and money from al Qaeda. He had been sent to the United States as a sleeper agent who would facilitate and commit terrorist acts within this country. Fortunately for us, he was intercepted before he could be successful in this mission, thanks to the efforts of our federal law enforcement officials. At the most basic level, though, Ahmed’s mission was not appreciably different from the German soldier dispatched here to attack military installations in *Quirin* or the al Qaeda operatives dispatched here to attack this country on 9/11. Consequently, if the allegations in the Murphy declaration are true, Ahmed would fall within the definition of an enemy combatant and his military detention would be authorized pursuant to the AUMF.

IV. ADEQUACY OF PROCESS AFFORDED TO AHMED

Even though Ahmed’s detention is authorized by the AUMF, there remains a question as to whether the district court afforded him due process under the Fifth Amendment in his challenge to his designation as an enemy combatant. Ahmed argues that by relying on hearsay evidence and forcing him to produce evidence to prove his own innocence, the district court failed to provide him with a fair opportunity to rebut the charges against him. The government responds that the district court properly adhered to the procedural framework for habeas proceedings in enemy combatant cases set forth by the Supreme Court in *Hamdi*.

A. The *Hamdi* Framework

The question of what process is due an individual challenging his enemy combatant status necessarily directs our attention to the Supreme Court’s consideration of this issue in

Hamdi. As discussed above, Hamdi was an American citizen captured on the battlefield in Afghanistan in 2001 by allies of the United States, and turned over to the custody of the American military. *Hamdi*, 542 U.S. at 510. The President designated him an enemy combatant and imprisoned him in the United States. *Id.* His father filed a habeas petition on his behalf, challenging his detention as an enemy combatant. *Id.* at 511. The government offered the hearsay statement of a Department of Defense official, Michel Mobbs (Mobbs Declaration), to support Hamdi’s designation as an enemy combatant. *Id.* at 512. The government argued that the court should not question the sufficiency of this evidence because respect for the constitutional authority of the executive and the “limited institutional capabilities of courts in matters of military decision-making eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme.” *Id.* at 527 (internal quotation marks omitted). Hamdi countered that “due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counter evidence.” *Id.* at 528. He insisted that the Supreme Court “consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding . . . to determine whether the Executive’s asserted justifications for that detention have basis in fact and warrant in law.” *Id.*

The *Hamdi* plurality rejected both positions, concluding that the government’s position conflicted with due process and normal habeas procedures, but also acknowledged that the realities of the military context through which enemy combatant cases arise may necessitate compromising some of the procedural requirements attendant to normal habeas proceedings. These normal proceedings are governed in part by 28 U.S.C. § 2241 and its companion provisions, which supply an outline of the process required under normal circumstances. These

sections of the law grant federal courts the power to review habeas petitions in the absence of a suspension of the writ by congressional action. Section 2243 requires the respondent to “show cause why the writ should not be granted,” and allows “the person detained [to] . . . under oath, deny any of the facts set forth in the return or allege any other material facts.” Section 2246 allows evidence to be gathered “orally or by deposition, or, in the discretion of the judge, by affidavit.” The *Hamdi* plurality noted that the outline provided by § 2241 reveals that Congress intended for habeas petitioners to have some opportunity to present and rebut facts, but that it also reserves for courts the authority to determine how petitioners will do this in particular cases in compliance with the demands of due process. *Hamdi*, 542 U.S. at 526 (“Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts[, but] . . . courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process.”).

An inherent conflict exists between “the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal,” and the “process that a citizen contends he is due before he is deprived of a constitutional right.” *Hamdi*, 542 U.S. at 528. The government has an interest in “detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict.” *Id.* at 530. Likewise, the government has an interest in “ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.” *Id.* at 531. These interests stand in opposition to petitioner’s interest in “the most elemental of liberty interests – the interest in being free from physical detention by one’s own government.” *Id.* at 529.

In *Mathews v. Eldridge*, the Supreme Court designed a balancing test to allow courts to reconcile these competing interests and arrive at procedures that account for both parties’

interests and satisfy the dictates of due process. 424 U.S. 319 (1976). Using the *Mathews* balancing test, the *Hamdi* plurality concluded that, at a minimum, due process requires that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi*, 542 U.S. at 533. Although the enemy combatant setting may render the full procedural protections afforded a habeas petitioner in other settings inappropriate, the executive’s ability to execute effective military operations is not so compromised by a system of basic judicial review as to outweigh an individual’s “core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.” *Id.* at 535.

In *Hamdi*’s case, the plurality acknowledged the practical difficulties involved in providing him with the procedural safeguards normally afforded a habeas petitioner. Because *Hamdi* was captured on a foreign battlefield, the witnesses would be military personnel in the field who may be “unnecessarily and dangerously distracted by litigation half a world away.” *Id.* at 531-32. Moreover, discovery would include evidence that would “both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war.” *Id.* at 532. The plurality conceded that these realities “*may* demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential burden to the Executive at a time of ongoing military conflict.” *Id.* at 533 (emphasis added). Significantly, the plurality noted that “[h]earsay, for example, *may* need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.” *Id.* at

533-34 (emphasis added). The plurality laid out a burden-shifting scheme to “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 (quoting *Mathews*, 424 U.S. at 335). Under this scheme, the government must first provide “credible evidence that the habeas petitioner meets the enemy-combatant criteria,” after which “the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.” *Id.*

B. The District Court’s Application of the Hamdi Framework

The application of these principles to the proceedings below leads us to the conclusion that the district court erred in finding that the procedures afforded Ahmed were consistent with his right to a fair opportunity to rebut the charges against him before a neutral arbiter. Due process requires the weighing of conflicting interests in light of particular facts to determine the appropriate process constitutionally required in a particular case. Taking the factual circumstances of Ahmed’s capture and detention into account, the district court should not have simply accepted the hearsay Murphy Declaration as the most reliable evidence available without questioning whether requiring the government to produce non-hearsay evidence would be unduly burdensome or would threaten to interfere with the military’s ability to carry out its mission on the field of battle.

1. The Hearsay Murphy Declaration

The district court concluded that in developing its burden-shifting framework, the *Hamdi* plurality devised a rigid procedural protocol to be imposed in every enemy combatant habeas proceeding. The *Hamdi* plurality allowed that hearsay evidence *may* provide the most reliable available evidence and *may* be therefore be sufficient to shift the burden to the petitioner to produce more persuasive evidence to the contrary. Therefore, the district court concluded that

the hearsay Murphy Declaration was sufficient to meet the government's burden of producing credible evidence to support its designation of Ahmed as an enemy combatant, thus placing the onus on Ahmed to produce more persuasive evidence to refute the government's assertions.

The *Hamdi* plurality, however, did not suggest that normal procedures *must* be compromised in every enemy combatant case without regard to the particular factual circumstances of each case, but rather found that “the exigencies of the circumstances *may* demand that . . . enemy combatant proceedings may be tailored to alleviate their uncommon potential burden to the Executive at a time of on-going military conflict.” *Hamdi*, 542 U.S. at 533 (emphasis added). The plurality's burden-shifting framework was intended not as a hard and fast rule to dictate the proper procedures in every case regardless of context, but rather as a mechanism to aid courts in balancing the interests of the parties, taking into account the unique facts of each case. Although the Murphy Declaration may be the most reliable evidence reasonably available in this case, the government failed to demonstrate this fact. The government made no showing that it would be unable to produce non-hearsay evidence without unduly burdening its interests, or that a relaxed evidentiary standard was necessary in light of the specific facts of this case. The *Hamdi* plurality clearly considered the context of Hamdi's battlefield capture and detention, and the unique burdens that would be imposed on the military in the midst of an on-going conflict when acknowledging that “[f]ull protections . . . *may* prove unworkable and inappropriate in the enemy combatant setting.” *Id.* at 535 (emphasis added). Hearsay declarations *may* be accepted as the most reliable evidence only after measuring the burden on the government of “providing greater process” against the fundamental liberty interest of the detainee. *Id.* at 529. The district court ignored the *Hamdi* plurality's directive that before denying a detainee the process due in normal habeas proceedings, the court must consider, “the

risk of erroneous deprivation” of the detainee’s liberty interest, “the probable value, if any, of any additional or substitute procedural safeguards,” and the possibility of introducing additional or substitute evidence. *Id.* (quoting *Mathews*, 424 U.S. at 335).

2. The Parties’ Respective Interests

Considering the interests of each party in this case leads to the conclusion that the district court erred in the process it provided during Ahmed’s habeas proceedings. Ahmed’s interest is the same “most elemental of liberty interests” as Hamdi’s – the interest in “being free from physical detention by one’s own government.” *Id.* at 529. While the interests of the two detainees are the same, the risk of erroneous deprivation in the two cases is different, given their different contexts. While Hamdi was captured on a foreign battlefield while bearing arms against the United States, Ahmed was captured within the United States by civilian authorities who have not adhered to the protocols of criminal procedure. The risk of erroneous deprivation is much greater in this context than in the circumstances presented in *Hamdi*, and this risk must be carefully weighed against the government’s interest before determining the procedures that will ultimately be adopted.

The government has a “weighty and sensitive” interest in protecting American citizens by “detaining those who actually pose an immediate threat to the national security of the [country] during an ongoing international conflict,” and in preventing “those who have in fact fought with the enemy . . . [from] return[ing] to battle against the United States.” *Id.* at 530-31. In addition, the burdens the government would face in “providing greater process” to habeas petitioners must be considered. *Id.* at 529. As weighty as these interests may be, however, they cannot be allowed to produce an “unchecked system of detention [that] carries the potential to become a means for oppression and abuse” *Id.* at 530.

The district court did not give sufficient attention to these competing interests. The conclusion it adopted may ultimately prove to be the correct one, and the procedures it outlined may prove to be adequate, though we refrain from ruling on that question here. The constitutional guarantee of due process requires at the very least that the government be required to demonstrate why any limitations placed on the normal habeas procedure would be necessary in this case. The district court must examine evidence that established why the detainee should not be entitled to full discovery, and why non-hearsay evidence cannot be produced without unduly burdening the executive in its execution of its war powers or endangering the safety of the nation. The district court did not undertake such an inquiry, nor did it consider the availability of alternate methods of protecting the government's interests while allowing for more procedural safeguards for the detainee. Rather, the district court uncritically accepted the government's Murphy Declaration as admissible, without demonstrating either that it is the most reliable available evidence or that additional procedural protections would be unduly burdensome. This process does not adequately account for the interests of the habeas petitioner.

3. Circumstances of Ahmed's Capture

In *Hamdi*, a plurality of the Supreme Court determined that the procedural framework afforded the detainee was constitutionally sufficient, given the context of his capture and detention. The factual circumstances surrounding Ahmed's capture and detention are dramatically different, making the procedural protections to which he is constitutionally due correspondingly different. The district court must consider the specific context of Ahmed's capture and detention to determine what procedural protections are constitutionally required in his habeas proceeding. Although the framework devised by the *Hamdi* plurality provides considerable guidance, courts should not rigidly impose that process when faced with a detainee who was captured as Ahmed was. Ahmed was attending school in East Dakota, not shooting at

American troops and their allies on a foreign battlefield. He was detained by the FBI, not by soldiers in the field. These facts do not prevent the President from determining Ahmed is an enemy combatant and ordering Ahmed to be detained indefinitely. They do, however, affect this court's determination of the process constitutionally required in his habeas proceeding.

Ahmed was arrested inside the United States by civilian authorities, so the relevant evidence against him is not likely "buried under the rubble of war," but contained in the records of the civilian officials that investigated him. *Id.* at 532. The practical burden placed on the government in producing the evidence against Ahmed is thus dramatically lessened.

Additionally, the time and place of Ahmed's capture heightens the risk of improperly depriving Ahmed of his interest in his liberty without due process. Although Hamdi was arrested on a foreign battlefield in the company of enemy soldiers and wielding a weapon, Ahmed was arrested at his home inside the United States, unarmed and in the company of his family. There is a much greater risk of misidentifying a civilian as an enemy combatant in this context. We must take care against the chilling possibility that a legal resident of the United States can be arrested and designated an "enemy combatant" without the full procedural protections attendant to a normal habeas proceeding.

Ultimately, the district court retains the authority to weigh the interests of the parties and structure the proceedings in a way that will be consistent with the demands of the Constitution. It may conclude that the hearsay Murphy declaration is the most reliable available evidence in this case; however, before any such ruling, it must require the government to produce evidence establishing this fact. The government has failed to offer any justification for its determination that regardless of the important differences in the factual circumstances of their cases, Ahmed is

constitutionally entitled to no more procedural protections than Hamdi received. Therefore, we hold that the district court erred in the process it afforded Ahmed in his habeas proceeding.

V. CONCLUSION

If the government's allegations are true, we have no doubt that the AUMF authorized the President to detain Ahmed. The authorization to detain comes from Congress in direct response to massive attacks on American soil, and the detention is in accordance with both Supreme Court precedent and the laws of war. However, Ahmed – a legal resident detained in the United States – has not been afforded sufficient process to challenge his designation as an enemy combatant, as mandated by the Fifth Amendment. We therefore reverse the decision of the district court and remand this matter to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Gray, Circuit Judge, concurring in the judgment, joined by Judges Molina and Rivera:

I write separately because I find myself in an unusual position. Although I do not agree with the court's reasoning on the first issue we confront in this case, and I would not reach the second, I am nonetheless concurring in the court's judgment that the district court's decision should be reversed and remanded for further proceedings to determine whether Ahmed was given adequate process to challenge his designation as an "enemy combatant." I strongly disagree with the court's reasoning that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF) authorizes, and the Constitution allows, the President to indefinitely detain Ahmed, a person who entered and was living in this country legally, without trial and as an enemy combatant, and I devote this opinion to responding to this conclusion. Regarding the adequacy of the process afforded to Ahmed, because I do not believe that the President is authorized to indefinitely detain him, I do not believe that this issue even needs to be

addressed, and Ahmed should be granted habeas relief that would require the government to criminally charge or release him.

I. THE PRESIDENT LACKS THE POWER TO INDEFINITELY DETAIN AHMED

The plurality opinion and the government contend that the AUMF, as construed by precedent and considered within the context in which it was passed, empowers the President to indefinitely detain Ahmed as an “enemy combatant,” even though Ahmed is a person who was lawfully admitted to this country, and the government has never alleged that he is a member of any nation’s military, fought alongside any nation’s armed forces, or took up arms against the United States anywhere in the world.¹ Even if the AUMF does not provide this authorization, the government argues that the Constitution gives the President the inherent authority to detain Ahmed. These claims are inconsistent with precedent and the accepted definition of an enemy combatant and find no support in the law. Therefore, I do not agree that the President is authorized to subject Ahmed to indefinite military detention as an enemy combatant, without charge or trial.

A. Governing Principles

At the outset, let me note that, while there are significant areas of disagreement between the parties and within the court, there are many areas of agreement about the relevant legal principles that apply to Ahmed in this case. Before turning to the areas of disagreement, let me set out the areas of agreement.

The Constitution guarantees that no “person” shall “be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V; *see also id.* amend. XIV, § 1. The

¹ The government conceded at oral argument that the AUMF authorizes only the detention of enemy combatants. The government did not argue that the AUMF empowers the President to indefinitely detain any individual who he believes has provided aid to any nation, organization, or person associated with the 9/11 attacks. Thus, we consider only whether Ahmed falls into the legal category of “enemy combatant,” and we have no occasion to reach further to define the full scope of detention authority conferred by the AUMF.

text of the Fifth Amendment applies not only to citizens, but to all “person[s],” so the constitutional protection from deprivation of liberty without due process of law extends to all lawfully admitted aliens living within the United States. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896). A long line of Supreme Court cases establishes that aliens receive certain protections – including those rights guaranteed by the Due Process Clause – “when they have come within the territory of the United States and developed substantial connections with this country.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *see also Boumediene v. Bush*, --- U.S. ---, 128 S. Ct. 2229, 2246 (2008) (noting that “the Constitution’s . . . substantive guarantees of the Fifth and Fourteenth Amendments . . . protect[] persons,” including “foreign nationals”). “Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Nevertheless, the Supreme Court has recognized some limited exceptions to this general rule, including the one upon which the government relies here – namely, that Congress may constitutionally authorize the President to order military detention, without criminal process, of persons who “qualify as ‘enemy combatants.’” *Hamdi v. Rumsfeld*, 542 U.S. 507, 516, 522 n.1 (2004). Someone who is detained as an enemy combatant may challenge this designation under the framework set forth in *Hamdi*.

B. Reading the AUMF to Grant the President the Authority to Indefinitely Detain Ahmed Conflicts with Precedent

There are two lines of precedent that are most relevant to the meaning of the AUMF’s grant of power, and the definition of an “enemy combatant.” There are those cases rooted in *Ex parte Quirin*, 317 U.S. 1 (1942), where the detainee at issue was clearly associated with the military arm of a nation at war with the United States. This line of cases includes *Hamdi* and *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), both of which deal with the same conflict that is

at issue in this case, and both of which interpret the grant of power under the AUMF. The courts in these cases concluded that indefinite military detention of a detainee clearly associated with the military arm of a nation at war with the United States – someone who falls into the established definition of an enemy combatant – even if the detainee is a citizen of the United States, was authorized. And then there are cases rooted in *Ex parte Milligan*, 71 U.S. 2 (1866), where the detainee committed serious acts aimed at harming the United States, but was not associated with the army of an enemy nation. Under this set of circumstances, the detainee was not considered an enemy combatant, could not be militarily detained, and instead had to be treated like any civilian and criminally tried for his alleged wrongdoing.

The plurality opinion asserts that the construction given the AUMF in *Hamdi* and *Padilla* supports the President's authority to determine who is an enemy combatant. Moreover, the plurality contends that Ahmed falls into the same category of persons that the Supreme Court in *Hamdi*, and a panel of the Fourth Circuit in *Padilla*, determined to be enemy combatants that Congress authorized the President to detain through the AUMF. The plurality misinterprets these cases, both of which involve detainees who were associated with the army of the Taliban government in Afghanistan, when it claims that they empower the President to treat Ahmed as an enemy combatant, even though the government has never alleged that he was a member of any nation's military, that he fought alongside any nation's armed forces, or that he ever took up arms against the United States.

In *Hamdi*, the Court looked to precedent and the laws of war to determine whether the AUMF authorized the President to indefinitely detain an American citizen who was captured while fighting with the Taliban against American forces in Afghanistan. *See* 542 U.S. 507, 518-22. The government offered evidence that Hamdi took several steps that justified his indefinite

military detention: (1) he “affiliated with a Taliban military unit and received weapons training,” *id.* at 510; (2) he “took up arms with the Taliban,” *id.* at 513; (3) he “engaged in armed conflict against the United States” in Afghanistan, *id.* at 516; and (4) upon his capture on the battlefield, he “surrender[ed] his Kalashnikov assault rifle.” *Id.* at 513. The Court upheld Hamdi’s detention because, by fighting against United States forces in a theatre of military operations as a member of the Taliban, Hamdi bore arms against this nation on behalf an enemy force. Accordingly, under the laws of war, Hamdi could be classified as an enemy combatant. *Id.* at 518-20.

In *Hamdi*, the Court recognized that the AUMF did not explicitly provide for detention. *Id.* at 519; *see also id.* at 547 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). The Court concluded on the facts in *Hamdi*, however, that the AUMF did not need to do so. As the plurality explained, “[b]ecause 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.*” *Id.* at 519 (emphasis added). Thus, the *Hamdi* Court’s holding was actually quite narrow, namely that “the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* we describe.” *Id.* at 517 (emphasis added). That narrow category of individuals includes those who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* at 516 (emphasis added) (internal quotation marks omitted); *accord id.* at 587 (Thomas, J., dissenting). The plain language of the opinion clearly indicates the need for both a “part of hostile forces” element and an “engaged in armed conflict against the United States” element, contrary to the plurality’s view in this case.

The plurality in *Hamdi* further clarified the limited reach of the AUMF to authorize military detention in the first instance, explaining that its opinion “only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual *is*, in fact, an enemy combatant.” *Id.* at 523 (emphasis added). The *Hamdi* plurality further cautioned that “[i]f the practical circumstances of a given conflict” differed from those of the traditional conflicts that informed the law of war, the AUMF may not authorize military detention at all. *Id.* at 521.

Similarly, though we are not bound by its holding, the logic employed by the Fourth Circuit in its ruling in *Padilla* is persuasive. *Padilla*, like *Hamdi*, concerned an individual detained after fighting for the enemy in a military theatre of operations. Unlike *Hamdi*, who was captured in Afghanistan, *Padilla* was captured at the border of the United States as he was attempting to “further prosecut[e] that war on American soil, against American citizens and targets.” *Padilla*, 423 F.3d at 389. The Fourth Circuit held that the AUMF authorized the President to detain as an enemy combatant an American citizen who had been “armed and present in a combat zone.” *Id.* at 390 (internal quotation marks omitted). Because the government presented evidence that *Padilla* “took up arms against United States forces . . . the same way and to the same extent as did *Hamdi*,” the Fourth Circuit concluded that *Padilla* “unquestionably qualifies as an ‘enemy combatant’ as that term was defined for the purposes of the controlling opinion in *Hamdi*.” *Id.* at 391. The Fourth Circuit also invoked the law of war in upholding *Padilla*’s detention, saying that they understood “the plurality’s reasoning in *Hamdi* to be that the AUMF authorizes the President to detain all those who qualify as ‘enemy combatants’ within the meaning of the laws of war.” *Id.* at 392. The *Padilla* court also commented that *Padilla*’s detention, like *Hamdi*’s, was permissible “to prevent a *combatant’s return to the battlefield* . . . a fundamental incident of waging war.” *Id.* at 391 (emphasis added) (quoting

Hamdi, 542 U.S. at 519). This reading is more compelling than the plurality’s reasoning that grants the President much broader powers to detain in this instance.

The plurality opinion also misinterprets *Ex parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, the Supreme Court held that the government properly concluded that a Nazi petitioner claiming American citizenship had been properly classified as an enemy combatant, because “[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 [combatants] within the meaning of . . . the law of war.”² *Id.* at 37-38. Considering that the United States had declared war on Nazi Germany, and that all the *Quirin* petitioners, including the one who claimed American citizenship, were paid and controlled by the “military arm” of Nazi Germany, the Court held that the law of war classified them as enemy combatants, and therefore the Constitution permitted subjecting them to military jurisdiction. *Id.* at 31.

Both *Hamdi* and *Padilla* build their holdings on the foundation of *Quirin*, which is to say that an individual is an enemy combatant when that individual affiliates during wartime with the “military arm of the enemy government.” *Quirin*, 317 U.S. at 37-38; *Hamdi*, 542 U.S. at 519; *Padilla*, 423 F.3d at 391. In *Quirin*, that enemy government was the German Reich; in *Hamdi* and *Padilla*, it was the Taliban government of Afghanistan, and not just an association with al Qaeda, that was the key to the court’s analysis.

Hamdi and *Padilla* further rely on this principle from *Quirin* to distinguish (without overturning) those cases from *Ex parte Milligan*, 71 U.S. 2 (1866). In *Milligan*, the Court invalidated a presidential order to detain an Indiana resident during the Civil War. *Id.* at 121-22. The government alleged that Milligan had communicated with the enemy Confederates,

² To clarify that determination about the laws of war, the Court cited the Hague Convention, “which defines the persons to whom [combatant] rights and duties attach.” *Quirin*, 317 U.S. at 30-31 n.7.

conspired to “seize munitions of war,” and “join[ed] and aid[ed] . . . a secret” enemy organization “for the purpose of overthrowing the Government and duly constituted authorities of the United States.” *Id.* at 6. On one hand, the Court recognized Milligan had committed “an enormous crime” during “a period of war” and at a place “within . . . the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy.” *Id.* at 7, 130. However, the Court found no support in the “laws and usages of war” to detain Milligan as a combatant, instead directing the government to try him in civilian court. *Id.* at 121-22, 130.

The plurality errs gravely by ignoring the strong emphasis in *Quirin* and *Hamdi* on *Milligan*’s core tenet: our Constitution does not permit the government to subject *civilians* within the United States to military detention. The *Quirin* Court distinguished *Quirin* from *Milligan* primarily based on the fact that the petitioners in *Quirin* were affiliated with the armed forces of an enemy nation, while Milligan, as a non-combatant, was “not subject to the law of war.” 317 U.S. at 45. Likewise, the *Hamdi* plurality took pains to note that *Milligan* “turned in large part on the fact that Milligan was not a prisoner of war,” and postulated that “[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different.” *Hamdi*, 542 U.S. at 522.

Following these cases, in *Padilla*, the Fourth Circuit reaffirmed that “*Milligan* does not extend to enemy combatants.” 423 F.3d at 396. *Padilla* could therefore be distinguished from *Milligan* “because Padilla, unlike Milligan, associated with, and has taken up arms against the forces of the United States on behalf of, an enemy of the United States.” *Id.* at 396-97. So while *Hamdi*, *Quirin*, and *Padilla* distinguish *Milligan*, they recognize that *Milligan*’s core holding

remains the law of the land. That is to say, civilians lawfully residing within the United States, even if they are “dangerous enemies” accused of “enormous crimes,” as part of “secret enemy organizations” that want to “overthrow the Government,” may not be subjected to indefinite military detention and the attendant deprivation of their constitutional rights. *Milligan*, 71 U.S. at 6, 130.

By contrast, the lone distinction the plurality opinion can muster against *Milligan* is that “Congress never authorized the use of force against the organization” in *Milligan*. *Supra*, at 17. This distinction is willfully ignorant of the facts, as the United States was clearly at war with the Confederacy, and Milligan was accused of being a Confederate agent, regardless of the ostensible name of the group with which he was affiliated. Furthermore, as the *Hamdi* plurality noted, that Milligan was not a combatant on the field of battle, and therefore not a prisoner of war, was “central to” the *Milligan* holding. Given that the Supreme Court unequivocally rebuffed an argument precisely parallel to the one the plurality makes here, this court is ignoring clearly articulated and carefully preserved principles to reach a result that does great damage to the protections afforded to persons in the United States.

C. The President Does Not Have the Inherent Constitutional Authority to Indefinitely Detain Ahmed

Even if the AUMF did not authorize Ahmed’s detention, the plurality and the government assert that the President has the “inherent constitutional authority” to detain Ahmed. The plurality opinion barely discusses this issue given the clarity it sees in the authorization provided by the AUMF. But I think it is important to address this argument in more detail here because to reach this conclusion stretches the Supreme Court’s holding in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) far beyond what it can support. The notion that the President’s “inherent power under Article II to wage war,” *supra*, at 18, provides him the authority to

indefinitely detain persons legally residing in this country and protected by our Constitution, without the benefit of any criminal process, if the President determines these individuals have engaged in terrorist acts or prepared for terrorist acts is simply breathtaking.

1. The *Youngstown* Framework

In order to evaluate claims of Presidential power in both wartime and peacetime, courts look to the framework established by Justice Jackson in *Youngstown*. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring). “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* at 637. And “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” *Id.* Therefore, to evaluate a constitutional claim of presidential power to detain aliens lawfully residing in the United States, we must first look to the “expressed or implied will of Congress” as to detention of aliens captured within the United States alleged to be engaged in terrorist activity.

2. The President is Acting Against the Express Wishes of Congress

The key to the assertions made by the court and by the government about the President’s inherent constitutional authority is that the President’s power is at its greatest here under the *Youngstown* framework because he is acting with congressional authorization under the AUMF to detain Ahmed. This is simply wrong. As explained above, the AUMF does not explicitly or implicitly authorize this type of detention at all. This conclusion is supported by Supreme Court precedent regarding the power to detain generally and the interpretation of the AUMF

specifically. Even if the AUMF did in some way relate to the type of detention at issue here, however, shortly after the AUMF was passed, Congress enacted another, more specific law that expressed its will regarding the powers granted to the President to detain “enemy aliens” in the 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 (Patriot Act).

Looking at the text of the AUMF, it is silent on the issue of detaining asserted alien terrorists captured within the borders of the United States. The Patriot Act, though, grants the President broad powers to deal with “terrorist aliens.” In doing so, however, it *categorically forbids* their indefinite detention. The statute authorizes the Attorney General to detain any alien whom he “has reasonable grounds to believe” (1) “seeks to enter the United States” to “violate any law of the United States relating to espionage or sabotage” or to use “force, violence, or other unlawful means” in opposition to the government of the United States; (2) “has engaged in a terrorist activity”; or (3) is “likely to engage after entry in any terrorist activity,” has “incited terrorist activity,” is a “representative” or “member” of a “terrorist organization,” is a “representative” of a “group that endorses or espouses terrorist activity,” or “has received military-type training” from a terrorist organization. Patriot Act § 412(a); 8 U.S.C. § 1182(a)(3)(A)-(B); *see also* 8 U.S.C. § 1227(a)(4)(A)(i), (a)(4)(A)(iii), (a)(4)(B). In addition, the Patriot Act authorizes the Attorney General to detain any other alien who “is engaged in any other activity that endangers the national security of the United States.” Patriot Act § 412(a). In particular, the Patriot Act permits the Attorney General to “take into custody” any “terrorist aliens” based only on the Attorney General’s “belie[fs]” as to the aliens’ threat, with no process or evidentiary hearing, and judicial review available only through petition for habeas corpus. *Id.*

Given this broad grant of power, Congress also imposed strict limits in the Patriot Act on the duration of the detention of such “terrorist aliens” within the United States. The Patriot Act expressly prohibits unlimited “indefinite detention”; instead it requires the Attorney General either to begin “removal proceedings” or to “charge the alien with a criminal offense” “not later than 7 days after the commencement of such detention.” *Id.* If a terrorist alien's removal “is unlikely for the reasonably foreseeable future,” he “may be detained for additional periods of up to six months” if his release “will threaten the national security of the United States.” *Id.* But no provision of the Patriot Act allows for unlimited indefinite detention. The Patriot Act also includes oversight provisions requiring the Attorney General to report to Congress on the use of this detention authority every six months, which must include the number of aliens detained, the grounds for their detention, and the length of the detention. *Id.* § 412(c).

Through the Patriot Act, therefore, Congress established a specific method for the government to detain aliens affiliated with terrorist organizations that the government believes have come to the United States to endanger our national security, conduct espionage and sabotage, use force and violence to overthrow the government, engage in terrorist activity, or are likely to engage in any terrorist activity. This could not match more closely the allegations against Ahmed, and it is clear that Congress intended for such individuals to be detained, but only for a limited time, and only by civilian authorities, prior to deportation or criminal prosecution.

3. The President’s Power is at Its Weakest in This Case and Ahmed’s Detention Should Not Stand

The plurality’s and the government's contention that the President may indefinitely detain Ahmed is clearly contrary to Congress’s expressed will. “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for

then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). As the Supreme Court has recently explained, “[w]hether or not the President has independent power . . . he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.” *Hamdan*, 548 U.S. at 593 n.23 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). In such cases, “Presidential claim[s]” to power “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). As discussed above, there is no question that Ahmed is entitled to due process rights under our Constitution, and when this is coupled with Congress's prohibition in the Patriot Act on the indefinite detention of those civilians arrested as “terrorist aliens” within this country, it is clear that the President’s claim of power here is far beyond what is granted to him by the Constitution.³ Ahmed’s indefinite military detention should end immediately.

II. CONCLUSION

The bottom line is that the plurality has not, and cannot, distinguish the case at hand from *Milligan*, nor can the plurality logically conclude that the President has the inherent constitutional authority to detain Ahmed. The government’s allegations against Ahmed exactly mirror the allegations against Milligan. Assuming the government’s allegations here are true, Ahmed is a dangerous man, as Milligan was. But also like Milligan, ultimately Ahmed is a civilian and he must be treated as one. Therefore, I would order Ahmed to be released from

³ It is worth emphasizing that this conclusion in no way calls into question the President's wartime authority over individuals who are properly categorized as “enemy combatants.” The point is simply that, absent a suspension of the writ of habeas corpus, the Constitution does not provide the President the power to exercise military authority over civilians within the United States, and subject them to indefinite detention without criminal trial. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (“[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief.”).

military custody at once and, if the government decides to charge him for his alleged crimes, transferred to the appropriate criminal authorities.

Morrison, Chief Circuit Judge, concurring in part and dissenting in part, joined by Judges Baker and Chen:

While I concur with the court's conclusion that the President does have the power to detail petitioner Ahmed, I must dissent from its conclusion that he was denied a meaningful opportunity to challenge his detention and the judgment that this matter should be sent back to the district court for further proceedings.

I. AHMED RECEIVED THE PROCESS HE IS DUE UNDER THE FIFTH AMENDMENT

Ahmed was afforded the same process that the Supreme Court set forth in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The problem in this case was not with the process adopted by the district court, but with Ahmed's refusal to participate in his own defense. When given an opportunity to rebut the government's evidence, Ahmed refused to do more than issue a general denial, declining to participate further because he believed he was entitled to a process more closely mirroring a full criminal trial. He argues now that because he was captured within the United States rather than on a foreign battlefield, he is entitled to more procedural safeguards than Hamdi received. But he offered no convincing justifications for why the location of capture has any relation to the process constitutionally owed a detainee, once he has been detained.

A. The District Court Correctly Applied the *Hamdi* Framework.

The magistrate judge and the district court correctly applied the Supreme Court's framework from *Hamdi* to this case and arrived at the appropriate conclusion, giving Ahmed the opportunity to refute his designation as an enemy combatant in habeas proceedings entirely consistent with his Fifth Amendment right to due process. In *Hamdi*, the plurality acknowledged

that a detainee has the right to challenge his designation as an enemy combatant by filing a habeas petition, and identified the three core requirements of due process. First, a detainee must “receive notice of the factual basis for his classification;” second, a detainee must be allowed “a fair opportunity to rebut the Government’s factual assertions;” and third, he must be given a hearing before a “neutral decisionmaker.” *Hamdi*, 542 U.S. at 533.

The procedures recommended by the magistrate judge and adopted by the district court were consistent with these “minimum requirements of due process.” *Id.* at 538. The Murphy Declaration offered by the government provided detailed information regarding the factual basis for his classification. Its allegations were surely sufficient to give Ahmed notice as to why he was designated an enemy combatant, and provided enough information to enable him to refute the designation. Ahmed was allowed 60 days to respond to the allegations in the Murphy Declaration, satisfying the demand that he receive “a fair opportunity to rebut the Government’s factual assertions.” *Id.* at 533. Ahmed also had the opportunity for a full-blown adversarial hearing if he was able to refute the government’s allegations. Finally, the habeas proceedings were presided over by the district court, which is certainly a “neutral decisionmaker.” *Id.* In short, Ahmed was provided with a fair and meaningful opportunity to respond to the government’s factual basis for his detention; it was his own failure to participate in these proceedings that denied him the opportunity to respond, not the procedures adopted by the court.

B. The Location of Capture is not Relevant to the Procedures Due a Detainee

The plurality opinion insists that even though Ahmed received the same procedural safeguards that a plurality of the Supreme Court approved in *Hamdi*, he was denied the process constitutionally due him. They argue that the difference in the locations in which the two detainees were captured – Hamdi on a battlefield in Afghanistan and Ahmed at his home inside the United States – alters the analysis of the process each must be afforded under the Fifth

Amendment. The Supreme Court did not acknowledge such a distinction in *Hamdi*, however, and the plurality offers no convincing reason why the location of a detainee's capture is relevant to this analysis of his constitutional rights.

Moreover, the plurality finds that because Ahmed was captured within the United States rather than on a foreign battlefield, the government must produce the "most reliable available evidence" to support his designation as an enemy combatant. *Id.* at 534. This requirement is inconsistent with the Supreme Court's decision in *Hamdi* and misinterprets the well-established principles of procedural due process.

1. Ahmed is Not Entitled to More Process than Hamdi

The plurality opinion contends that Ahmed is entitled to more procedural safeguards than Hamdi received because Ahmed was captured inside the United States by civilian authorities, thereby increasing the risk that he was erroneously deprived of his freedom. This focus on the location of a detainee's capture, and the implication the location has on the process due a detainee, is not present in *Hamdi*. The *Hamdi* plurality defined the issue they decided as "what process is constitutionally due a citizen who disputes his enemy-combatant status," and its discussion of procedural due process requirements for enemy combatants did not place any weight on the locus of the detainee's arrest. *Id.* at 524. Nor should it have, for there is no principled reason for such a distinction to be made. The plurality suggests that the risk of erroneously detaining an individual as an enemy combatant is much higher within the United States than on a foreign battlefield, but offers no support for this conclusion. In fact, it is easy to envision how the conditions of modern warfare, with its constantly shifting alliances and

militants hidden within the general civilian population, make it very challenging indeed to identify enemy combatants.¹

Our nation's struggle against international terrorism extends beyond our borders, but we must remain vigilant to threats within our homeland as well. The need for our courts to develop procedures for enemy combatants to challenge their detention that not only protect the due process rights of the detainees, but also allow the government to protect the national security of the nation does not change based upon the location of the detainee's arrest.

2. The Plurality's "Most Reliable Evidence" Standard is Inconsistent with *Hamdi*

According to the plurality opinion, because Ahmed was arrested within the United States and is thus entitled to more process than Hamdi, Ahmed has the right to require that the government offer only "the most reliable available evidence" to prove that he is an enemy combatant. *Hamdi*, 542 U.S. at 534. The plurality devised this novel standard based on the *Hamdi* plurality's remark that "[E]nemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding." *Id.* at 533-34. The plurality assumed that this statement signaled the plurality's approval of a rigid standard requiring the government to prove in its initial showing that its evidence is the most reliable available evidence.

The plurality opinion's interpretation of this statement is inconsistent with the principles established in *Hamdi*, however. There, the plurality designed a careful burden-shifting scheme

¹ No Supreme Court decision alters this analysis. In *Boumediene v. Bush*, the Court considered only the narrow issue of what procedures are constitutionally due a detainee under the Suspension Clause, excluding the implications of the same questions analyzed under the Due Process Clause. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The Court explicitly refused to consider the issue addressed in *Hamdi* and in Ahmed's case *Id.* at 2270 ("[W]e make no judgment as to whether the [Combatant Status Review Tribunals (CSRTs)] . . . satisfy due process standards . . .").

to aid courts in adopting appropriate procedures in enemy combatant habeas proceedings that take each party's interests into account, and further cautioned courts to act in a way that is "both prudent and incremental." *Id.* at 539. By forcing the government to prove that the evidence it presents is the "most reliable available evidence," the plurality abandons the *Hamdi* plurality's burden-shifting scheme and ignores its admonition to move forward slowly and thoughtfully. *Id.* at 534. Its new standard would remove from Ahmed the burden to refute the factual basis of his detention. The *Hamdi* plurality explicitly acknowledged that the government may meet its initial burden by presenting evidence from "a knowledgeable affiant" who "summarize[s]" the factual basis for the detainee's enemy combatant status. *Id.* The Murphy Declaration offered by the government against Ahmed, more detailed and thorough in its explanation of the factual basis for Ahmed's detention than the Mobbs Declaration accepted by the *Hamdi* plurality, certainly meets this standard.

The procedural safeguards required by due process are put in place to ensure the accuracy of the proceedings and to prevent the erroneous deprivation of the interests of either party. District courts must be allowed to be flexible and to implement procedures that are appropriate given the context of an individual case. The Supreme Court has repeatedly emphasized that due process does not require one set of procedures that must be rigidly applied in every case. The "most reliable available evidence" standard devised by the plurality denies the district court the authority to determine what procedures would be appropriate in each enemy combatant case, instead forcing the court to impose one standard regardless of the unique complexities of each case. The plurality would introduce unnecessary procedures that would increase the government's evidentiary burden without any indication that the accuracy of the proceedings will be heightened or the risk of erroneous deprivation lessened.

II. CONCLUSION

It is clear that the district court afforded Ahmed sufficient process. Although the procedural safeguards demanded by due process are integral to ensuring fair treatment of individuals within the judicial system, and provide a check on the excesses of executive power, due process protections must be maintained in a delicate balance with the interests of those working to ensure the safety and security of our nation. The *Hamdi* plurality recognized these competing interests and created a framework to keep these interests in balance. It protected the interests of detainees by guaranteeing them notice of the factual basis for their detention as well as the ability to refute their designation as enemy combatants. It also acknowledged, however, the need for the government to retain the authority to effectively confront the threats to our peace and security we are now facing. The plurality concluded that by requiring a detainee to cast some doubt on the government's evidence before triggering the full procedural protections of an adversarial hearing, neither party's interest must be overly compromised.

The plurality's decision today would obliterate this careful balancing act. My colleagues would require Ahmed to be afforded something very close to full criminal process. The acts that Hamdi and Ahmed are accused of committing, however, go beyond the definition of normal civilian crimes; they are terrorist activities, closer to acts of war than to domestic crimes. Congress acknowledged this by passing the AUMF, and the Supreme Court recognized it in *Hamdi*. The plurality today refuses to acknowledge this reality, and ignores the guidance of Congress and the Supreme Court. I must, therefore, dissent from this part of the court's opinion.

APPENDIX A

Declaration of John R. Murphy Director, Joint Intelligence Task Force for Combating Terrorism

1. I, John R. Murphy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

Preamble

2. I submit this Declaration for the Court's consideration in the matter of Ahmed v. United States, pending in the United States District Court for the District of East Dakota.
3. Based on the information that I have acquired in the course of my official duties, I am familiar with all the matters discussed in this Declaration, and all of the information regarding Burhan Uddin Ahmed gathered by the Federal Bureau of Investigation (FBI) and by personnel of the Department of Defense (DoD) once the DoD took custody of Ahmed after he was declared an enemy combatant by the President of the United States.

Declaration of Ahmed as an Enemy Combatant

4. The President of the United States declared Ahmed an enemy combatant on June 13, 2003. The President made this determination based on intelligence gathered and analyzed through the cooperation of several Executive Branch agencies.

Ahmed's Background and Training

5. Ahmed is a Pakistani citizen.
6. Ahmed attended an al Qaeda-run terrorist training camp in Afghanistan for 18 months between 1996 and 1998. He was trained in the use of poisons.
7. In Afghanistan, Ahmed cultivated relationships with senior al Qaeda leaders, including Osama Bin Laden and Khalid Sheikh Muhammad.
8. Ahmed legally entered the United States with his family on September 8, 2001. He was ostensibly in the United States to pursue a doctorate in veterinary medicine at Wilson University in Wilson, East Dakota. When he was arrested by the FBI in January 2002, he was in failing status at the university due to his consistent absenteeism.

Ahmed's al Qaeda Activities

9. Ahmed was commissioned by al Qaeda to enter the United States as a sleeper agent. While in Afghanistan Ahmed met personally with Osama Bin Laden. Ahmed volunteered to be an al Qaeda martyr or to do whatever else was asked of him. He was sent to the United States to establish cover as a sleeper agent.
10. In the United States, Ahmed received substantial funding from Mustafa Ahmed al-Hawsawi, the financial facilitator of 9/11.
11. Ahmed acted as a contact point for al Qaeda operatives newly arriving in the United States. In addition, Ahmed was instructed to investigate the plausibility of hacking into the main-frame computer systems of the Social Security Administration with the objectives of creating chaos in the United States's social safety net and securing revenue for future terrorist attacks through Social Security fraud.

Analysis of Laptop Computer

12. The FBI conducted a forensic examination of Ahmed's laptop computer. The investigation revealed that Ahmed was conducting research regarding use of chemicals as weapons of mass destruction.
13. The highly technical information found on Ahmed's laptop far exceed the interest of a merely curious individual, and rather is consistent with the documented interests of al Qaeda and other terrorist groups.
14. Ahmed's laptop also contained several computer programs typically utilized by computer hackers, and bookmarked websites devoted to computer hacking.
15. In addition, the laptop analysis revealed computer files containing Arabic lectures by Bin Laden and his associates on the importance of jihad and martyrdom, and the merits of the Taliban regime in Afghanistan.

Telephone Communications

16. After September 11, 2001, calling cards and cellular phone accounts attributed to Ahmed were used to attempt to contact a high-ranking al Qaeda officer known to be residing in the United Arab Emirates. Calls to the same number were made by several pay phones in the Wilson, East Dakota, area.

Social Security Card Theft

17. In Ahmed's laptop carrying case, a handwritten list of Social Security numbers and the names of their holders. All of the approximately 40 cards were issued to persons other than Ahmed.
18. During the forensic examination of Ahmed's computer, evidence of efforts to sell Social Security numbers was discovered.

Conclusion

19. In conclusion, this joint investigation has turned up sufficient evidence to determine that Ahmed was an active al Qaeda agent at the time he entered the United States. After entering the country, he engaged in conduct in preparation for acts of international terrorism intended to cause injury to the United States. Ahmed's status has been carefully and thoroughly reviewed, and it has been determined that Ahmed represents a continuing grave threat to the United States. Ahmed must be detained to prevent him from aiding al Qaeda in its efforts to attack and harm the United States.

JOHN R. MURPHY

Director, Joint Intelligence Task Force for Combating Terrorism
Executed on 15 August 2004 in Washington, D.C.