

IN THE  
**Supreme Court of the United States**

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**BURHAN UDDIN AHMED,  
PETITIONER,**

**V.**

**UNITED STATES OF AMERICA,  
RESPONDENT.**

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

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**BRIEF FOR PETITIONER**

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Team Number 1234  
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## QUESTIONS PRESENTED

- I. Whether the Authorization for the Use of Military Force authorizes, and 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?
  
- II. Whether the process afforded by the district court to challenge a designation as an "enemy combatant" was sufficient under the requirements of the Fifth Amendment?

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## **OPINIONS BELOW**

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## **JURISDICTIONAL STATEMENT**

Burhan Uddin Ahmed invoked the jurisdiction of the district court by filing a petition for a writ habeas corpus pursuant to 28 U.S.C. §2241. The district court, which had jurisdiction under 28 U.S.C. §1331 and §2241, entered judgment on August 9, 2006, dismissing Ahmed's petition. Ahmed filed a timely notice of appeal and Court of Appeals for the Twelfth Circuit had subject matter jurisdiction pursuant to 28 U.S.C. §1291 and §2253(a). The judgment of court of appeals was entered on November 24, 2008. The petition for a writ of certiorari was granted on October 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## **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.

**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, § 412(a) (Patriot Act):**

(a) In General- The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after section 236 the following:

Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review

SEC. 236A. (a) Detention of Terrorist Aliens . . .

(6) Limitation on Indefinite Detention - An alien detained solely under paragraph (1) who has not been removed . . . and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

Approved October 24, 2001

## **28 U.S.C. §2241 Power to Grant Writ**

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the

application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

## STATEMENT OF THE CASE

Burhan Uddin Ahmed is a Pakistani citizen and a legal resident of the United States. (R. at 7, 47.) Ahmed legally entered the United States with his family on September 8, 2001 to pursue a doctorate in veterinary medicine at Wilson University in Wilson, East Dakota. (Id.)

Ahmed was arrested by the FBI in January of 2002 (Id.), and in November of 2002 he was charged in the District of East Dakota with possession of counterfeit social security cards with the intent to defraud (R. at 7). He was declared an enemy combatant by the President of the United States on June 13, 2003 (R at 7, 47), two days before the scheduled pre-trial motion hearing in his criminal case which was to address a motion to suppress evidence that Ahmed claimed was obtained by torture (R. at 7).

After his transfer to military custody, 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. (R. at 8.) The government opposed his release and provided the court with a hearsay document, the Declaration of John R. Murphy, Director of the Joint Task Force for Combating Terrorism (Murphy Declaration). (R. at 8, 47-48.) The Murphy Declaration summarizes the intelligence gathered by the government and alleges that Ahmed was an operative of al

Qaeda acting as a sleeper agent within the United States, was trained in a terrorist training camp in Afghanistan, communicated with high-ranking members of al Qaeda, entered the United States with the intent to commit terrorist attacks within the country, and possessed valuable intelligence about al Qaeda. (R. at 8-9, 47-48.) Although the Murphy Declaration alleges that Ahmed was an active al Qaeda agent at the time he entered the United States, (R. at 47), according to the President's order, Ahmed's enemy combatant designation was not based on a finding or even an allegation that he was a member of al Qaeda, but rather only that he was allegedly associated with the group. (R. at 7.) Specifically, the enemy combatant designation was based on alleged ties to al Qaeda, conduct "in preparation for acts of international terrorism," possession of important intelligence, and representing a threat to the United States. (Id.) According to the Murphy Declaration, the President made this determination based on information gathered and analyzed through the cooperation of several unspecified administrative agencies. (R. at 47.)

The district court sent the case to a magistrate judge to determine the procedure that Ahmed must be afforded. (R. at 9.) The magistrate judge rejected Ahmed's argument that he should be afforded procedural safeguards substantially equivalent to those criminal defendants receive. (Id.) The magistrate determined

that the government must provide Ahmed with notice of the factual basis for 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. (Id.) If Ahmed produced such evidence, the government would have to either release him or agree to a full adversarial hearing. (Id.)

Using the burden-shifting framework, the magistrate concluded that the Murphy Declaration provided Ahmed with adequate notice of a factual basis for his detention and offered sufficient evidence indicating that Ahmed was an enemy combatant to put the burden on Ahmed to produce more persuasive evidence refuting this determination. (R at 9.) Asserting that he was not an enemy combatant, but not offering additional evidence, Ahmed responded with a general denial and a claim that the procedures adopted by the magistrate unconstitutionally required him to prove his own innocence. (R at 9-10.) Because Ahmed did not present separate evidence in his own defense, the district court dismissed his petition. (R at 10.) Ahmed appealed and a panel of the Twelfth Circuit affirmed the district court's dismissal. (Id.)

The military has held Ahmed as an enemy combatant for seven years without charge or trial, without any indication as to when his detention will end. (R. at 8.)

## **SUMMARY OF THE ARGUMENT**

The Authorization for Use of Military Force (AUMF) allows the President to apply the force of his military authority to pursue and punish those responsible for the terrorist attacks of September 11, 2001. However, the AUMF does not expand the scope of the President's military powers. Specifically, the AUMF did not authorize the President to seize and indefinitely detain an individual who is not a member of the military arm of al Qaeda. Ahmed is a civilian under the laws of war and case law because the Government does not allege that Ahmed was a member of al Qaeda or engaged in combat activities against the United States. Additionally, the Constitution does not allow the President to indefinitely detain a civilian alien seized in the United States because such individuals are entitled to full due process rights.

The Fifth Amendment right to due process is a right guaranteed to any "person" and as such extends to legal residents of the United States. As a legal resident of the United States that was arrested while in the United States, Ahmed is entitled to the full procedural protections guaranteed by the Fifth Amendment in his petition for habeas corpus. The Government has not shown that any circumstances exist that would necessitate any variation from normal due process procedures in a habeas proceeding. To make such a showing, the Government

would have to demonstrate that normal due process protections would be impractical, outweighed by national security interests, or otherwise unduly burdensome. The Government has not even attempted to show that any of these concerns would be relevant to Ahmed's case, and therefore there is no justification for any variance from normal due process protections in Ahmed's habeas petition.

This Court should affirm the holding of the Court below based on the fact that the President lacks the statutory and Constitutional authority to detain Ahmed and the fact that Ahmed was denied due process rights that he should have been entitled to under the Fifth Amendment of the Constitution.

#### **ARGUMENT**

**I. The President is not authorized to indefinitely detain Ahmed under the AUMF or the Constitution because Ahmed is a civilian and is guaranteed due process rights.**

Congress passed the AUMF to ensure that the President had the authority to use his full military authority against a non-traditional enemy force responsible for the terrorist attacks on September 11th, 2001. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 § 2(a) (2001). The legislation, however, did not expand the scope of those powers or grant the President authority to detain civilians captured in the United States. Thus, the AUMF does not authorize the

President to indefinitely detain Ahmed because Ahmed is a civilian and the AUMF does not authorize the indefinite detention of civilians.

Due process rights extend beyond citizens of the United States to all individuals legally within the United States. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990). Also, to ensure the functionality of Constitutional separation of powers, where the President's actions are inconsistent with the will of Congress, those actions are unlikely to survive the Court's scrutiny. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring). Therefore, the President lacks Constitutional Authority to detain Ahmed because Ahmed has full due process rights and the indefinite detention of Ahmed is contrary to Congress's express will that detention of resident aliens be limited.

**A. The President lacks authority under the AUMF to indefinitely detain Ahmed because Ahmed is a civilian and the AUMF only allows indefinite detention of enemy combatants.**

For purposes of indefinite detention under the AUMF, an individual is not an enemy combatant unless that individual is a part of al Qaeda or associated military forces or directly participated in a belligerent act in support of such forces. Hamlily v. Obama, 616 F. Supp. 2d 63, 78 (D.D.C. 2009). The due process guarantees within the Fifth Amendment are so important

that nullification of those rights are subject to strict consideration. Greene v. McElroy, 360 U.S. 474, 507 (1959). Finally, if two statutes are in conflict, the more specific one controls. Edmond v. United States, 520 U.S. 651, 657 (1997).

Since the President did not allege Ahmed was a member of al Qaeda (or any military force for that matter) and Ahmed did not directly participate in a belligerent combat act, Ahmed is a civilian. Congress has made it clear, both explicitly and implicitly, that it did not intend the AUMF to extend the scope of the President's military powers to include the detention of civilians. 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), explicitly limits the President's military detention power while the AUMF is silent on the issue. Id. § 412(a). Therefore, the Patriot Act supersedes the AUMF regarding the President's authority to indefinitely detain civilian aliens such as Ahmed. In light of those considerations, this Court should reverse the findings of the court below and prohibit the detention of Ahmed as an enemy combatant.

1. **The AUMF does not authorize the President to indefinitely detain Ahmed because Ahmed was not a member of al Qaeda and did not engage in belligerent acts against the United States.**

While the characterization of an individual as an enemy combatant is reliant on a fact specific determination, the President is not authorized to indefinitely detain an individual when that individual is not an enemy combatant. Hamdi v. Rumsfeld, 542 U.S. 507, 522 n. 1 (2004); Ex Parte Milligan, 71 U.S. 2, 121-22 (1866).

The President's authority to indefinitely detain based on his military powers is limited to enemy combatants, a designation defined by the courts. In Hamdi, this Court allowed the indefinite detention of an individual affiliated with Taliban forces in Afghanistan. 542 U.S. at 521. Likewise, in Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005), the court allowed the detention of an individual captured "armed and present in a combat zone" as consistent with the President's authority under the AUMF. Id. at 391-92. Thus, where an individual is clearly engaged in hostile combat activities, the President's authority under the AUMF allows indefinite detention as an enemy combatant. See Hamdi, 542 U.S. at 513 (stating that detainee was armed and operated as part of a Taliban military unit during American hostilities with the Taliban in Afghanistan); Padilla, 423 F.3d at 389-90 (finding that detainee

travelled throughout Afghanistan armed with an assault rifle as a member of al Qaeda forces). However, Hamdi only authorizes the President's detention of an individual captured in armed conflict against the United States. 542 U.S. at 516.

Under the AUMF, the President's authority to detain is limited by the laws of war and court holdings that prohibit the indefinite detention of civilians. Milligan established that the President cannot subject civilians captured in the United States to military detention. 71 U.S. at 121-22. The Government alleged that Milligan had supported the Confederacy and joined and aided a group committed to the overthrow of the government of the United States. Id. at 6. This Court found that even if the allegations were true, Milligan was a civilian and thus entitled to trial in civilian court pursuant to the Constitution. Id. at 121-22.

A workable distinction between enemy combatant and civilian, in light of the non-traditional "war on terror" is necessary. In Hamliily, detainees at Guantanamo Bay challenged the legality of their detentions and raised a question as to the scope of the Government's authority to detain individuals pursuant to the AUMF. 616 F. Supp. 2d at 66. The court established that an individual who is not a member of al Qaeda can only be indefinitely detained as an enemy combatant pursuant to the AUMF if that person directly participated in a

belligerent act in aid of Taliban or al Qaeda forces. Id. at 78. Specifically, the President lacks authority to detain an individual who substantially supports al Qaeda if he is technically not a part of al Qaeda even if he does have a meaningful connection to the organization. Id. at 76. Further, the President lacks such authority if the detainee only directly supported hostile activities as opposed to committed a belligerent act. Id. at 77.

Ahmed is a civilian, not an enemy combatant because unlike the detainees in Hamdi and Padilla, Ahmed never engaged in hostile activities against the United States in a combat zone. Instead, Ahmed is closely analogous with the petitioner in Milligan as the Government alleges that Ahmed is associated with an enemy organization but does not allege that he directly participated in hostile combat activities against the United States. Consistent with Milligan, Ahmed was alleged to be aiding an organization with which the United States was at war. However, also consistent with Milligan, Ahmed was a civilian because he was not a combatant on the field of battle. Based on that similarity, Ahmed is a civilian and is not subject to indefinite detention under the AUMF because he is not alleged to have raised arms against the United States in combat and is subject to trial in a civilian court.

Additionally, applying the definition of enemy combatant established in Hamliily, Ahmed is a civilian and not subject to indefinite detention because he did not directly participate in a belligerent act in support of al Qaeda or Taliban forces. Pursuant to Hamliily, Ahmed is removed from the scope of the AUMF because the Government does not assert that Ahmed is a member of al Qaeda and the AUMF does not authorize the indefinite detention of an individual who is technically not part of al Qaeda. Finally, consistent with the Hamliily standard for an enemy combatant, Ahmed is not subject to indefinite detention because the Government alleges only that he has supported hostile activities as opposed to directly participating in belligerent acts.

The plurality below explicitly recognized that Ahmed was a civilian yet chose to endorse his indefinite detention. (R. at 19.) That decision is inconsistent with this Court's holdings which clearly indicate that where an individual is not an enemy combatant and captured in the United States he is to receive a trial within the civilian justice system. Milligan, 71 U.S. at 121-22; see also Hamdi, 542 U.S. at 522 (suggesting that the outcome of Milligan hinged on the fact that he was not a prisoner of war but a civilian); Ex Parte Quirin, 371 U.S. 1, 45 (1942) (distinguishing Milligan from German soldiers captured in the United States because Milligan was a non-combatant). Thus,

the Court should affirm the holding of the court below on the grounds that the AUMF does not allow Ahmed's indefinite detention because he is a civilian.

**2. The AUMF does not authorize the President to indefinitely detain a civilian because the Patriot Act limits detention of civilians and supersedes the AUMF.**

The AUMF contains no language granting the President authority to detain a civilian captured in the United States and authority for an indefinite detention is governed by the more specific Patriot Act. See Edmond, 520 U.S. at 657 ("[W]here a specific provision conflicts with a general one, the specific governs."); Greene, 360 U.S. at 507 (prohibiting the application of a statute to curtail constitutional rights without an express indication of that intention on the part of Congress).

Executive agents cannot rely on legislation to deprive individuals of constitutionally guaranteed rights without an explicit indication of Congress's intent to authorize such a deprivation. In Greene, the Court considered whether in the absence of legislation or Executive Order, the Department of Defense was authorized to create an industrial security clearance program that could deprive life, liberty, or property without providing constitutionally required procedural safeguards. 360 U.S. at 493-95. Before the Court will determine that Congress intended to deprive individuals of their

constitutionally protected rights, it must be clear that Congress specifically decided that such a deprivation was appropriate through explicit legislative action. Id. at 507. Such a decision requires explicit legislative action because it is essential to safeguard rights that Congress did not intend to deprive and because explicit action "requires careful and purposeful consideration." Id. The Court determined that constitutionally guaranteed rights, specifically those related to due process, are too important to be nullified based on implicit assent, acquiescence, or inaction on the part of Congress. Id.; see also Ex parte Endo, 323 U.S. 283, 300 (1944) ("We must assume, when asked to find implied powers in a grant of legislative . . . authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.").

Legislative history rejects the proposition that the AUMF extends the President's authority to detain individuals beyond the definition of enemy combatant as the term is traditionally understood pursuant to the laws of war. During Congressional consideration of the AUMF, legislators acknowledged their understanding that the AUMF authorized the President's use of military force only against those responsible for the September 11th attacks. See 147 Cong. Rec. S9423 (statement of Sen. Biden) (arguing that the AUMF addressed the President's

authority with regard to the September 11th attacks but the general authority to prevent terrorism lies within the federal criminal laws). Specifically, Congress rejected language allowing the use of military force to preempt or deter any act of terrorism against the United States. Id. Additionally, subsequent Congressional hearings indicate that shortly after the passage of the AUMF, neither legislators nor members of the Bush administration believed that the AUMF authorized indefinite detention of terrorists. See al-Marri v. Pucciarelli, 534 F.3d 213, 240 n. 21 (4th Cir. 2008) (Mozt, J., concurring) (discussing the Congressional consideration of the Patriot Act) vacated as moot, al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.).

Instead, the Patriot Act is the proper tool for the President to pursue civilians engaged in terrorist conspiracies living in the United States and that statute limits the President's power to detain. Passed shortly after the AUMF, the Patriot Act authorizes the President to detain foreign terrorists captured in the United States and explicitly prohibits indefinite detention by establishing a maximum term of detention of six months. Patriot Act, § 412(a). Initial draft legislation allowed the executive branch to indefinitely detain some terrorists captured within the United States. al-Marri, 534 F.3d at 241 n. 21. However, those powers were explicitly

stripped from the final version of the Patriot Act, indicating Congress's intention that the Executive cannot indefinitely detain foreign terrorists captured in the United States if they do not qualify as enemy combatants. Id. Finally, it is a well established principal that specific statutes govern general statutes, thus giving more weight to the Patriot Act's terms regarding detention. Edmond, 520 U.S. at 657.

Consistent with Greene, the President is attempting to deprive Ahmed of constitutionally guaranteed due process rights by denying him a civilian trial. The rights at issue in Ahmed's situation are the same as those in Greene and the same level of judicial deference should be given to Ahmed's rights. Also, similar to Greene, nowhere in the AUMF did Congress explicitly assert its intention to abrogate the due process rights of foreign civilians captured in the United States. Thus, based on that case, the President does not have authority to indefinitely detain Ahmed, a civilian captured in the United States, because Congress did not explicitly grant that authority in the AUMF.

Additionally, in light of the legislative history surrounding the AUMF and the Patriot Act, Ahmed's indefinite detention is exactly what Congress sought to prevent when it limited the President's broad requests for authority in early drafts. Specifically, the legislative history and text of the two statutes make it clear that Congress actively sought to

limit the President's ability to expand his scope of military power. Instead, legislative material show the AUMF simply was an attempt by Congress to ensure that the President could apply his existing military powers to a non-traditional enemy.

Finally, based on Edmond, the more specific Patriot Act governs over the terms of the general AUMF because the Patriot Act specifically limits the President's scope of power with regard to detention of resident aliens while the AUMF only serves as a general grant of war power against a designated enemy. Applying the rule in Edmond, the Patriot Act's limitation on the detention of a foreign terrorist controls and applies to Ahmed, thus prohibiting the President from detaining Ahmed indefinitely.

The plurality below argued that the Patriot Act only limits the President's authority under Article II, § 3 of the Constitution and because the AUMF addresses the President's Commander-in-Chief power, the two are not in conflict and the Patriot Act does not govern. (R. at 18.) Such a finding is contrary to the underlying values promoted in Greene in that it allows an executive agency to avoid Constitutional limitations without an explicit direction from Congress. Also, the lower court's position has no basis in the law, this Court has never held that a specific statute's supremacy over a general statute

is limited to specific executive powers. al-Marri, 534 F.3d at 241 n. 22.

In light of the above, based on Ahmed's status as a civilian, the AUMF does not authorize the President to detain Ahmed indefinitely. Thus the Court should affirm the judgment of the court below based on a finding that the President lacks authority to detain Ahmed indefinitely.

**B. The President lacks inherent constitutional authority to indefinitely detain Ahmed because Ahmed has constitutionally ensured rights as a civilian and indefinite detention violates those rights and is contrary to the will of Congress.**

Resident aliens lawfully residing in the United States have due process rights as guaranteed in the Fifth Amendment and the President cannot abrogate those rights if such action would be contrary to Congress's will. Verdugo-Urquidez, 494 U.S. at 271; Youngstown, 343 U.S. at 637-38.

Executive power is limited with regard to civilian aliens because the Constitution guarantees significant protections to such individuals. Specifically, aliens legally and physically present in the United States have the same due process rights as American citizens. Verdugo-Urquidez, 494 U.S. 259 at 271; Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953). In Kwong Hai Chew, this Court considered whether agents of the executive branch could detain and exclude a resident alien from the United States. Id. at 594-96. The petitioner in that case was

detained upon his return from a trip at sea. Id. at 594-95. This Court held that the detention of the resident alien was unconstitutional because it was not accompanied by due process considerations. Id. at 603.

The President's scope of authority to indefinitely detain a civilian is limited by Congress's action on the issue. Justice Jackson's famous concurrence in Youngstown established that where the President acts contrary to the express or implied will of Congress, the President's action is subject to "severe tests." 343 U.S. at 637-38, 640 (Jackson, J., concurring). A majority of this Court in Dames & Moore v. Regan, 453 U.S. 654 (1981), adopted Jackson's framework in assessing executive action. See id. at 669 (describing Jackson's classifications as "analytically useful"). In Youngstown, this Court rejected President Truman's seizure of private steel mills to prevent labor unrest from stopping steel production during the Korean War. 343 U.S. at 582. In supporting the majority's holding, Justice Jackson argued that the President's action was inconsistent with the legislature's will because Congress had passed three bills addressing the seizure of steel mills, none of which was relied upon by the President in his seizure of the mills. Id. at 639 (Jackson, J., concurring). Giving deference to executive power, Jackson explained that none of the Constitutional grants of authority - including the President's

Commander-in-Chief authority - justified the seizure of steel mills in direct contravention of Congress's will. See, e.g., id. at 644 ("That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.'").

As discussed more specifically in Part I.A.2 of this Brief, Congress both explicitly and implicitly indicated an intention that civilian aliens are not to be detained indefinitely. The Patriot Act explicitly prohibits the indefinite detention of non-enemy combatant aliens by limiting the detention of such individuals to six months at most. Patriot Act, § 412(a). Additionally, Congress implicitly indicated their will by rejecting the Bush Administration's attempts to expand the scope of the President's military powers. al-Marri, 534 F.3d at 240 n. 21.

Based on Verdugo-Urquidez and Kwong Hai Chew, Ahmed is guaranteed due process rights to the same extent as citizens because Ahmed was lawfully admitted to the United States to pursue educational opportunities and he remained in the United States up to and including the time he was arrested. Ahmed's connections to the United States, specifically the fact that he attended college and resided in the United States with his

family, are more than sufficient to satisfy the contact requirements enumerated in those two cases.

Ahmed's due process rights are protected from infringement by the President based on the Youngstown decision's deference to the separation of powers principals. Under the Youngstown standard, Congress has both expressly and implicitly indicated that the President cannot restrict due process rights of civilians by subjecting them to indefinite detention. Similar to the powers President Truman used to justify his action in Youngstown, the Constitutional authority the President asserts in this case cannot overcome the express indication from Congress that indefinite detention is unacceptable. Finally, as illustrated in Justice Jackson's concurrence, even the President's broad powers as Commander-in-Chief are not sufficient to override the power of Congress to limit the President's ability to take action without ensuring due process.

Therefore, since Ahmed has full due process rights and indefinite detention of Ahmed contravenes Congress's express will that resident aliens' detention be limited, the President lacks the Constitutional authority the Government seeks to ascribe to him. The Court should affirm the holding of the court below but reverse the decision that the President has inherent Constitutional authority to indefinitely detain Ahmed.

**II. The process provided to Ahmed by the district court to challenge his designation as an "enemy combatant" was not sufficient under the due process requirements of the Fifth Amendment because Ahmed was a legal resident arrested in the United States and the government did not show that normal procedures would be unduly burdensome.**

Even if Ahmed's detention was authorized by the AUMF, the district court did not afford him due process under the Fifth Amendment in his challenge to his designation as an enemy combatant. The Constitution guarantees that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. This guarantee is not limited by its text to a citizen, but rather provided to a "person," therefore the Constitutional right to freedom from deprivation of liberty without due process of law extends to all lawfully admitted aliens living within the United States. al-Marri, 534 F.3d at 269. As discussed in Part I.B 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." Verdugo-Urquidez, 494 U.S. at 271; see also Boumediene v. Bush, 128 S. Ct. 2229, 2246 (2008) (including "foreign nationals" among the persons protected by the Fifth and Fourteenth Amendments).

Normal habeas proceedings are governed in part by 28 U.S.C. §2241 and its companion provisions which outline the process

required under normal circumstances. 28 U.S.C. §2241 (2008). The Supreme Court has recognized that “the outline of §2241 makes clear that 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.” Hamdi, 542 U.S. at 526.

Because Ahmed was legally living in the United States when he was arrested and had been charged in a criminal case in the District of East Dakota, proper procedure should be followed and he should receive full due process protection under the Fifth Amendment. See al-Marri, 534 F.3d at 269. Further, Ahmed should be entitled to the normal due process protections available to all within the United States, including an opportunity to confront and question witnesses against him, unless the Government can demonstrate that such protections would be impractical, outweighed by national security interests, or otherwise unduly burdensome. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

**A. Ahmed is entitled to procedural protections because Ahmed was a legal resident living in the United States, he had not participated in battle against the United States, and he was arrested in the United States.**

Although due process requirements may vary depending on circumstances, the Hamdi plurality never suggested that normal

habeas corpus procedures must or should be compromised in every enemy combatant case. In Hamdi, the Court made a more fact based distinction 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). This assessment draws in part on a century old Supreme Court decision Moyer v. Peabody, where the Court acknowledged that "it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." 212 U.S. 78, 84-85 (1909).

Hamdi was born in the United States, moved to Saudi Arabia as a child, and resided in Afghanistan in 2001. Hamdi, 542 U.S. at 510. At some point in 2001 he was seized by the Northern Alliance and turned over to the United States military. Id. He was interrogated in Afghanistan, transferred to Guantanamo Bay, and upon discovery of his U.S. citizenship he was moved to a naval brig in Norfolk, VA and then to a brig in Charleston, SC. Id. According to the Mobbs Declaration he had been engaged in battle when his Taliban unit surrendered to the Northern Alliance. Id. at 512.

The Hamdi decision focused on "practical difficulties" inherent in the facts of Hamdi's situation as he was captured on

the battlefield in Afghanistan and the potential witnesses would be military personnel who could be “unnecessarily and dangerously distracted by litigation half a world away.” Hamdi, 542 U.S. at 532. The Court expressed additional concerns that discovery into military operations would result in many intrusions into secrets of national defense and in a futile search for evidence buried under the rubble of war. Id. Due to these considerations, the Court was willing to allow modified due process procedures. Id.

Though the decision was vacated as moot, the Fourth Circuit has addressed a situation factually similar to Ahmed’s circumstances in this case. Ali Saleh Kahlah al-Marri was a Qatari national and legal resident of the United States who was arrested in the United States. Al-Marri, 534 F.3d at 217. While criminal proceedings against al-Marri were underway, he was transferred to military custody and detained as an enemy combatant. Id. The Fourth Circuit concluded that al-Marri’s status as a legal resident arrested in the United States entitled him to more protections than a non-resident or someone arrested outside of the United States. Id. In particular, the Fourth Circuit found that al-Marri should have a fair opportunity to challenge his designation as an enemy combatant with at least the minimal requirements of due process guaranteed by the Fifth Amendment. Id. at 254. Because the practical

difficulties that were present in Hamdi were not present in al-Marri the Fourth Circuit was less lenient with regards to the modification of due process requirements. Id.

Ahmed is entitled to the due process protections ensured under the Fifth Amendment because he was arrested within the United States by civilian authorities who have the resources and the responsibility to uphold the protocols of criminal procedure. Unlike Hamdi, who was captured on the battlefield in Afghanistan, Ahmed was arrested by federal authorities in the United States. While criminal proceedings were pending against Ahmed, he was declared an enemy combatant and transferred to military detention, where he has been held indefinitely. Like al-Marri, Ahmed is entitled to due process and should have a fair opportunity to challenge his enemy combatant status. Further, since Ahmed was arrested in the United States while living here as a legal resident, he is entitled to full due process protections under the Fifth Amendment, and the decision of the district court should be affirmed.

**B. The district court process was not sufficient because the Government has not demonstrated why any limitations placed on the normal habeas procedure would be necessary under the circumstances of Ahmed's case.**

Ahmed is entitled to the normal due process protections available to all within the United States, including an opportunity to confront and question witnesses against him,

because the Government has not demonstrated that such protections would be impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens imposed on the government to produce non-hearsay evidence and accede to discovery requests. al-Marri, 534 F.3d at 273; Mathews, 424 U.S. at 335. Only if the Government can demonstrate to the satisfaction of the district court that one or more of these problems exist, then alternatives should be considered and employed. Id.

The Supreme Court has held that the required due process in any particular instance may vary based on a specific judicial determination. Hamdi, 542 U.S. at 526; Mathews, 424 U.S. at 335. Recently, the Court reiterated the “uncontroversial” principles that “the privilege of habeas corpus entitled the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.” Boumediene, 128 S. Ct. at 2266. In addition to such an opportunity, the Court elaborated that a constitutionally adequate habeas corpus proceeding may require more “depending on the circumstances.” Id. Most importantly the Court noted that historically “common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending on the circumstances.”

Id. If the normal habeas procedure could otherwise be available, the Government must give a compelling reason to alter an individual's access to due process of law, otherwise we risk an "unchecked system of detention [that] carries the potential to become a means for oppression and abuse . . . ." Hamdi, 542 U.S. at 530.

In order to determine what process is due, the Court must first weigh "the private interest that will be affected by the official action" against the Government's asserted interest "including the function involved" and the burdens the Government would face in providing greater process. Mathews, 424 U.S. at 335. In order to balance these concerns, the Court must analyze (1) "the risk of an erroneous deprivation" of the private interest if the process were reduced and (2) the "probable value, if any, of additional or substitute procedural safeguards." Id.

Applying the Mathews test to the facts in Hamdi, the Supreme Court concluded that the government's position on what procedure should be afforded to Hamdi conflicted with due process and normal habeas procedures; however, the Court was willing to compromise some of the procedural requirements attendant to normal habeas proceedings due to the realities of the military context through which enemy combatant cases arise. Hamdi, 542 U.S. at 526. Because Hamdi was captured in a foreign

nation after being detained on a battlefield, the crux of the government's argument in Hamdi was that "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war." Hamdi, 542 U.S. at 531-32.

In al-Marri, the Fourth Circuit held that al-Marri had not been afforded sufficient process to challenge his designation as an enemy combatant. 534 F.3d at 269. In one of seven concurring opinions, Judge Traxler reasoned that the Hamdi Court allowed lower procedural standards only upon a showing of undue hardship by the government, and that such hardship was especially clear when a petitioner was seized on a foreign battlefield where the prospect of high evidentiary standards might interfere with military operations. See al-Marri, 534 F.3d at 270-71 (Traxler, J., concurring); Hamdi, 542 U.S. at 531-32. Because al-Marri was seized by federal law enforcement in Illinois, Judge Traxler concluded that as a general rule he was "entitled to the normal due process protections available to all within this country," absent a satisfactory showing by the government. al-Marri, 534 F.3d at 270-71 (Traxler, J., concurring).

While the need for flexibility may have been present in Hamdi, the Government has made no showing that the same need is present in Ahmed's case. Under the circumstances of Ahmed's case, additional procedural protections would not be unduly burdensome. Consistent with al-Marri, Ahmed is entitled to full due process protections because he was seized by federal law enforcement officials on American soil. The district court accepted the Murphy Declaration as admissible without demonstrating either that it is the most reliable available evidence or that additional procedural protections would be unduly burdensome.

#### **CONCLUSION**

For the foregoing reasons, Ahmed respectfully requests that this Court affirm both the final holding of the United States Court of Appeals for the Twelfth Circuit and the decision that the process afforded to him was insufficient under the Fifth Amendment. However, Ahmed also respectfully requests that this Court reverse the court's finding that the President has the authority to detain him indefinitely.