

No. 08-11144

In The

Supreme Court of the United States

BURHAM UDDIN AHMED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Twelfth Circuit**

PETITIONER'S BRIEF ON THE MERITS

Team 1498

QUESTIONS PRESENTED

This case presents the questions of what circumstances are required for the President of the United States to have the authority to indefinitely detain a person as an "enemy combatant" and what rights does the Constitution confer to the detainee to challenge his status as an "enemy combatant."

Specifically:

1. Whether the President of the United States has the inherent power or express authorization from Congress under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) to seize and indefinitely detain, without criminal charges or trial, a person lawfully residing in the United States based on governmental assertions that the person was part of a terrorist conspiracy with al Qaeda despite the circumstances of the person's capture.

2. Whether admitting the government's hearsay evidence and requiring the detainee to prove that he was not an enemy combatant without regard to the specific context of the case violated the detainee's right to Due Process of law under the Fifth Amendment.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Twelfth Circuit is not reported, but the slip opinion can be found at *Ahmed v. United States*, No. 06-9701 (12th Cir. Nov. 24, 2008). The opinion by the United States District Court for the District of East Dakota is not reported.

JURISDICTION

The United States District Court for the District of East Dakota had jurisdiction under 28 U.S.C. 1331. The United States Court of Appeals for the Twelfth Circuit had jurisdiction under 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

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.

U.S. CONST. amend V. The text of the following two statutes is set out in the appendix: Authorization for Use of Military Force

(AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("Patriot Act") of 2001, Pub. L. No. 107-56, 115 Stat. 272.

STATEMENT OF THE CASE

On September 8, 2001, Petitioner Burhan Uddin Ahmed, a citizen of Pakistan, lawfully entered the United States with his family. Ahmed was pursuing a doctorate of veterinary medicine at Wilson University in Wilson, East Dakota. On September 11, 2001, terrorists associated with the al Qaeda organization flew passenger airliners into targets in the United States, killing nearly 3,000 people. Nearly four months later, on January 2, 2002, federal agents went to Ahmed and his family's home in Wilson, East Dakota, and arrested Ahmed as a "material witness" in the investigation of the terrorist attacks that occurred on September 11, 2001 ("the 9/11 attacks").

Eleven months after Ahmed's arrest, in November 2002, the federal prosecutor filed charges in the District of East Dakota alleging Ahmed had possessed counterfeit Social Security cards with intent to defraud. In January 2003, the federal prosecutor also charged Ahmed with making a false statement to the Federal Bureau of Investigation ("FBI"). Ahmed plead not guilty to all charges, and the district court scheduled trial for July 17,

2003. The district court scheduled a hearing for pretrial motions for June 15, 2003, during which time Ahmed was set to argue that the court should suppress certain evidence allegedly obtained by torture.

Two days before this hearing, President Bush signed a Presidential Order that declared Ahmed to be an "enemy combatant" and that Attorney General Ashcroft was required to release Ahmed to Secretary of Defense Donald Rumsfeld. Based on this order, the federal prosecutor filed an ex parte motion to dismiss the criminal charges against Ahmed, and the district court granted this motion. United States military personnel took custody of Ahmed and transferred him to a detention facility in East Dakota.

Ahmed filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the District of East Dakota seeking either release, the filing of charges against him, or a hearing to challenge his status as an "enemy combatant." The district court held that Ahmed could be detained as an "enemy combatant," but he had some due process right to challenge his status as an "enemy combatant." A magistrate judge then determined that Ahmed's due process was satisfied by a presumption against Ahmed's innocence if the government provided both notice of the

factual basis of Ahmed's detention and "credible evidence" supporting his classification as an "enemy combatant."

The government provided a two-page hearsay document ("the Murphy Declaration"), which alleged that Ahmed's confiscated laptop contained technical information about biologically destructive chemicals; software and "bookmarks" to internet websites that relate to computer "hacking"; and "lectures" about jihad, martyrdom, and the Taliban government. The Murphy Declaration also alleged that Ahmed had been in possession of a list of forty names and Social Security numbers; that he had previously tried to telephone an alleged "officer" of al Qaeda; that he had received some al Qaeda training (including information about poison) between 1996 and 1998; and that he had received money from a person who allegedly helped finance the attacks of 9/11. The magistrate judge determined these hearsay statements to be both "credible evidence" and notice of the factual basis of Ahmed's detention, and shifted the burden to Ahmed to prove his innocence. The magistrate judge gave Ahmed sixty days to present "more credible evidence" that he was not an enemy combatant.

Ahmed challenged this presumption of guilt as a violation of the United States Constitution. The magistrate judge recommended dismissal of Ahmed's habeas corpus petition, and the

district court adopted this recommendation as an order. Ahmed appealed this dismissal, and the United States Court of Appeals for the Twelfth Circuit affirmed in a panel decision. Ahmed filed a motion for a rehearing. The Twelfth Circuit vacated the panel decision and heard the case again *en banc*. On November 24, 2008, the Twelfth Circuit reversed the district court's decision and remanded, holding that the President of the United States does have the authority to detain Ahmed but Due Process had not been satisfied.

Ahmed has been waiting in military detention for approximately six and a half years without charges, without a trial, and without any indication whether his detention will ever end.

SUMMARY OF THE ARGUMENT

The Twelfth Circuit erred by holding that Congress, in passing the Authorization for Use of Military Force ("AUMF"), authorized the President to indefinitely detain Ahmed, a legal resident not associated with the military arm of an enemy nation. First, the Twelfth Circuit departed from long-standing precedent that rests enemy combatant status on the detainee's membership in the army of an enemy nation. Second, the Twelfth Circuit ignored Congress' intent, expressed in the Patriot Act, that specifically prohibits the indefinite detention of aliens

accused of terrorist conduct within the United States. The Patriot Acts requires domestic terrorism cases to be tried by the civilian criminal and immigration courts. In unilaterally depriving a lawful alien of his constitutional right to criminal prosecution, the President has not only exceeded the authority Congress granted him under the AUMF, but he has far exceeded his powers under Article II of the United States Constitution.

The Twelfth Circuit also erred by improperly limiting Ahmed's Due Process. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court held that, before limiting Due Process, a court must weigh the private interest at stake, the risk of error and probative value of proposed procedures, and the public's interest and burden on the government of providing Due Process. This test was used by the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in the "enemy combatant" context.

The district court erred by hearsay and by creating a presumption in favor of Ahmed's guilt without following the *Mathews* and *Hamdi* precedents. Ahmed is deprived of the weightiest of all interests: his liberty. The risk of erroneous detention is high. The burden on the government to provide better procedures is low. A *de novo* balancing of the interests reveals that Due Process should not have been limited.

ARGUMENT

I. THE AUMF DOES NOT AUTHORIZE, AND THE CONSTITUTION DOES NOT ALLOW, PETITIONER'S INDEFINITE MILITARY DETENTION AS AN ENEMY COMBATANT WHERE HE IS NOT ASSOCIATED WITH AN ENEMY GOVERNMENT.¹

The Due Process Clause of the Fifth Amendment guarantees that citizens arrested in the United States will be afforded the right to a criminal proceeding before a jury. *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."). Due process protections apply equally to citizens and aliens lawfully residing in the United States. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

Central to the protection of liberty under due process is the "[f]reedom from bodily restraint" or imprisonment. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *accord Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). This Court, however, has determined that the Constitution allows a very narrow exception to this most basic constitutional right: the President may detain only those citizens or lawful aliens who qualify as "enemy

¹The government conceded at oral argument that the AUMF only provides authority to detain enemy combatants. The government is not arguing that the broad language of the AUMF allows detention of all persons the President determines aided any "nation[], organization[], or person[]" responsible for the September 11th attacks. Therefore, the narrow issue before the court is whether Ahmed qualifies as an enemy combatant.

combatants." *Hamdi v. Rumsfeld*, 542 U.S. 507, 516, 522 n.1 (2004).

In *Ex Parte Milligan*, 71 U.S. 2 (1866), this Court was asked to determine whether Milligan qualified as an enemy combatant, and thus subject to military trial. The government asserted that Milligan was a member of a terrorist organization, the "Sons of Liberty," that communicated with the Confederate Army during the Civil War. *Id.* at 6-7. He was accused of conspiring to "seize munitions of war . . . for the purpose of overthrowing the Government." *Id.* As part of an alleged conspiracy organization that "had been taken in action with arms in hand," the government argued Milligan was properly within the jurisdiction of the military. *Id.* at 202. This Court, however, refused to characterize Milligan as an enemy belligerent despite describing his conduct as "an enormous crime" in "a period of war." *Id.* at 7, 130. *Milligan* held that the Constitution and the laws of war do not allow the President the authority to order the military to try "citizens . . . in nowise connected with the military service" of an enemy government. *Id.* at 122. This Court required Milligan to be tried in civilian court consistent with his Fifth and Sixth Amendment rights. *Id.* at 121-22.

This Court again was asked to address the scope of the enemy combatant exception in *Ex Parte Quirin*, 317 U.S. 1 (1942). The petitioner, Haupt, was a United States citizen who, based on his own admission, was a member of the German army during active hostilities in World War II. *Id.* at 7. Haupt reached the eastern shores of the United States by German military submarine, clothed in military uniform, and armed with explosives and other incendiary devices. *Id.* at 7-8. *Quirin* held that, where citizens attempt to attack the United States on behalf of "the military arm of the enemy government," they are "enemy belligerents within the meaning of . . . the law of war." *Id.* at 15-16. Thus, as a member of the German Reich, the military force of a government at war with the United States, the petitioner in *Quirin* fell precisely within the definition of an enemy combatant as defined by the laws of war.

Hamdi v. Rumsfeld, 542 U.S. 507 (2004), evaluated not only the definition of lawful combatant as determined by *Milligan*, *Quirin*, and the laws of war, but also the grant of authority under the AUMF. Hamdi was captured on the battlefield in Afghanistan fighting against U.S. forces for the Taliban government. *Id.* at 509-511. The Court emphasized that it was only answering "the narrow question" of whether persons who are alleged to be "part of or supporting forces hostile to the

United States" in Afghanistan, and who "engaged in an armed conflict against the United States" while in Afghanistan, are enemy combatants as defined by the laws of war and precedent. *Id.* at 516. This Court held that, despite the AUMF not explicitly mentioning detention, the "necessary and appropriate" clause in the statute authorized the detention of individuals, like Hamdi, "who fought against the United States in Afghanistan as part of the Taliban" government. *Id.* at 518. This Court explained that, based on the laws of war, "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Id.* at 519. However, this Court warned that "[if] the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," the AUMF may not authorize military detention. *Id.* at 521. Therefore, like *Quirin*, *Hamdi* relied on the laws of war to determine that an enemy combatant is a member of a *military* associated with an *enemy government*.

In *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), the Fourth Circuit affirmed *Hamdi* and *Quirin's* definition of enemy combatant. While the Fourth Circuit's holding is not binding on this Court, the Twelfth Circuit looked to *Padilla* as informative. *Padilla* was accused of associating with al Qaeda

and, though he was captured in the United States, he fought alongside the Taliban forces in Afghanistan. *Id.* at 388, 391. The Court held that Padilla, like Hamdi, "took up arms against the United States forces" along side the Taliban in Afghanistan. *Id.* at 391. Therefore, "like Hamdi, Padilla is an enemy combatant, and because his detention is no less necessary than was Hamdi's in order to prevent his return to the battlefield, the President is authorized by the AUMF to detain Padilla as a fundamental incident to the conduct of war." *Id.* at 392.

In distinguishing *Milligan*, *Padilla* and *Quirin* recognized that Milligan was not an enemy combatant because he was not a part of the military arm of an enemy government. *Quirin* explained that, unlike Haupt who was fighting for the Nazis during World War II, Milligan was a "non-belligerent" and thus not "subject to the law of war." *Quirin*, 317 U.S. at 19. The other members involved in the planned attack at issue in *Quirin*, but who were not members of the German Reich, were tried in civilian courts, further evidence that Haupt's membership in the German military was central to his combatant status. See *Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943). Likewise, *Hamdi* emphasized that the decision in *Milligan* "turned in large part on the fact that Milligan was not a prisoner of war" (i.e. an enemy combatant),

and that if he had been captured "while he was assisting the 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. Thus, *Hamdi* and *Quirin* not only recognize that *Milligan* is firmly rooted, but they affirm that, based on the laws of war, an enemy combatant is one who fights against the United States on behalf of an enemy government.

Ahmed is not an enemy combatant as that category is defined under the clearly articulated precedent laid out by this Court or under the laws of war. First, unlike *Hamdi* and *Padilla*, Ahmed is not a member of the Taliban forces, nor was he caught fighting against U.S. troops in Afghanistan. The government alleges that Ahmed was trained by al Qaeda in Afghanistan between 1996 and 1998, three years before the September 11 attacks took place and the war between United States and Afghanistan began. Also unlike *Hamdi*, *Padilla*, and *Quirin*, Ahmed is not a member of any military arm of any enemy government. Ahmed is a citizen of Pakistan, a nation not at war with the United States. Ahmed is accused of associating with al Qaeda, an organization the United States is admittedly at war with. However, though al Qaeda is a dangerous enemy, it is a non-state organization. Therefore, even if the allegations

against Ahmed are true, his membership in a rogue, stateless organization does not qualify him for enemy combatant status as defined by precedent and the laws of war.

Milligan is the controlling authority in this case. Ahmed's alleged membership with al Qaeda is like Milligan, who was also accused of being a member of a secret enemy organization. If the allegations against Ahmed are true, he, like Milligan, would be guilty of violating numerous domestic laws. However, *Milligan* made clear that, citizens (and equally lawful aliens), despite being members of an organization aimed at harming the government, do not lose their constitutional right to a criminal trial when they are "in nowise connected with the military service" of an enemy government. *Milligan*, 71 U.S. at 122. Like Milligan, the military does not have jurisdiction over Ahmed, and his constitutional right to criminal proceedings must be restored.

Moreover, unlike *Hamdi* and *Padilla*, Ahmed's military detention is not "necessary" or "appropriate" within the meaning of the laws of war. On January 3, 2002, Ahmed was detained by federal authorities, charged with several criminal offenses, and remained incarcerated in State custody for one-and-a-half years. The only explanation the government provided as to why military detention was necessary was to "prevent [Ahmed] from aiding Al

Qaeda." However, Ahmed was already incapacitated, and the government has not explained why domestic laws or the criminal process were any less capable of trying Ahmed than the military. There are numerous criminal and immigration laws available to law enforcement to intercept and prevent terrorist activity. *See, e.g., Hamdi*, 542 U.S. at 547-48 (Souter, J., concurring) (discussing the "well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit."). The government's decision to transfer Ahmed to military custody is puzzling considering it has repeatedly tried aliens charged with terrorist conduct in the United States in civilian court. *See, e.g., United States v. Abdi*, 463 F.3d 547, 550 (6th Cir. 2006); *United States v. Moussaoui* 382 F.3d 453 (4th Cir. 2004); *United States v. Reid*, 369 F.3d 619, 619-20 (1st Cir. 2004); *United States v. Goba*, 240 F. Supp. 2d 242, 244 (W.D.N.Y. 2003). This only underscores any argument the government may have that the military transfer and detention of someone like Ahmed, already in custody and charged under domestic law, was somehow "necessary or appropriate."

Requiring an "enemy combatant" to be a state actor, and that the laws of war refuse to classify members of a terrorist organization as enemy combatants, is based on important

principles. *al-Marri v. Wright*, 487 F.3d 160, 187 n.15, *en banc rehearing granted* (4th Cir. 2007). An “enemy combatant” is a legal category that endows certain rights and protections during war, such as the right to lawfully kill enemy forces and be treated humanely while being detained by the enemy. *al-Marri v. Pucciarelli*, 534 F.3d 213, 318–19 (4th Cir. 2008), *vacated on other grounds*, *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). By allowing members of al Qaeda to be labeled enemy combatants, the United States would be recognizing al Qaeda as a lawful and unified entity, and may have to provide them with certain rights and protections under the laws of war. *See, e.g., id*; Message from the President of the United States Transmitting the Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, S. Treat Doc. No. 100-2, at IV (1987) (explaining President Reagan’s warning against ratifying a treaty provision that “would grant combatant status to irregular forces” and so “give recognition and protection to terrorist groups”).

Ahmed is not an enemy combatant as defined by precedent and the laws of war; therefore, the AUMF does not provide the President with detention authority, and Ahmed must be transferred to federal authorities and tried in the civilian courts consistent with the United States Constitution.

II. THE COMMANDER-IN-CHIEF'S WAR POWER UNDER ARTICLE III DOES NOT INCLUDE THE INHERENT AUTHORITY TO INDEFINITELY DETAIN LAWFUL ALIENS LIKE AHMED, ESPECIALLY WHERE CONGRESS HAS EXPLICITLY DENIED THE PRESIDENT SUCH AUTHORITY.

Article II of the United States Constitution firmly establishes that the President has the authority to respond to sudden attacks on the United States. See *Prize Cases*, 67 U.S. (2 Black) 635, 668-669 (1863). However, this power is not applicable to Ahmed because the government is not arguing that the President is detaining Ahmed in response to a sudden attack on the country, or that the country was under an imminent threat on January 3, 2002, the day of his arrest. Therefore, the President has no inherent constitutional authority to militarily detain Ahmed.

Moreover, in evaluating the scope of Presidential authority allowed by the Constitution, we must also look to the framework articulated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). See *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring). Justice Jackson explained that when the President is acting with the express or implied consent of Congress, he is acting within his maximum powers. *Youngstown*, 343 U.S. at 635. When Congress has neither granted nor denied the President 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." *Id.* at

637. But when the President acts directly against the "express or implied will of Congress, his power is at its lowest ebb."

Id.

In this case, because Congress enacted the United 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"), just days after the September 11th attacks, the President's authority to authorize Ahmed's detention is at its lowest ebb. The Patriot Act authorizes the Attorney General to detain any alien who "he has reasonable grounds to believe" is conducting sabotage or espionage, or "has engaged in," is "likely to engage in," or is "inciting" terrorist activities while in the United States, or is a "member" of a "terrorist organization." Patriot Act § 412(a); 8 U.S.C. § 1182(a)(3)(A)-(B).

In passing the Patriot Act, Congress expressly prohibited the Executive from indefinitely detaining aliens like Ahmed who are accused of terrorist activities in the United States. See Patriot Act § 412. The statute requires the Attorney General to initiate "removal proceedings" or to "charge the alien with a criminal offense . . . not later than seven days after the commencement of such detention." *Id.* If the circumstances warrant, and national security would be threatened by release,

the detainee's detention may be extended for "additional periods of up to six months." *Id.* § 412(c).

As Judge Gray's concurrence pointed out, the Patriot Act addresses the very type of detention at issue in this case—the detention of aliens accused of terrorist activities in the United States. However, the AUMF does not address matters of detention at all. Where there is any doubt between the AUMF and the Patriot Act, norms of statutory construction require the specific provisions on detention in the Patriot Act to prevail over the general grant of war power 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”); *Busic v. United States*, 446 U.S. 398, 406 (1980). This is especially true here, where interpreting the AUMF to allow detention of a lawful alien would take away his constitutional protections of the Fifth and Sixth Amendments. *See, e.g., Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

Congress expressly denied the President the power to indefinitely detain aliens accused of terrorist activities in the United States, and the President can not now seek the very authority Congress denied from the judiciary. This Court has warned that, when Congress has denied a specific power to the President, a later assertion to that power "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Moreover, Justice Frankfurter explained, "[i]t is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." *Id.* at 609. Therefore, as Judge Gray concluded, considering the Patriot Act's specific prohibition on detaining aliens like Ahmed accused of terrorist activities in the United States, the President has greatly exceeded his constitutional authority by ordering his military detention.

III. THE DISTRICT COURT VIOLATED AHMED'S RIGHT TO DUE PROCESS BY ADMITTING HEARSAY EVIDENCE AND BY REQUIRING AHMED TO PROVE HIS INNOCENCE WITHOUT FIRST BALANCING EACH PARTY'S INTERESTS.

The Fifth Amendment to the United States Constitution states that "[n]o person shall . . . be deprived of life,

liberty, or property without due process of law." U.S. CONST. amend V. This requirement of due process imposes limitations on the government's ability to deprive an individual of liberty or property. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Due process is required not only in criminal proceedings but in all proceedings in which an individual may "suffer grievous loss of any kind." *Id.* at 333 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

The Fifth Amendment's guarantee of due process is essential to protect our nation in important ways. First, it prevents the government from abusing its power. *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 196 (1989). Without the requirement of due process, there would be no check on the Executive branch's ability to oppress individuals by arbitrarily and unfairly depriving them of their liberty or property. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Second, the Fifth Amendment is necessary to protect against unfair or mistaken deprivations of liberty and property. See e.g., *Heller v. Doe by Doe*, 509 U.S. 312, 332 (1993). The individual's interest at stake is simply an entitlement to a fair and accurate determination of truth but not necessarily a favorable outcome. *Id.*

United States citizenship is not a prerequisite for protection under the Constitution; the Fifth Amendment does not "acknowledge any distinction between citizens and resident aliens." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); accord *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Wong Wing*, 163 U.S. at 238. "There are literally millions of aliens within the jurisdiction of the United States [and t]he Fifth Amendment . . . protects every one of these persons from deprivation of life, liberty, or property without due process of law." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

The type and amount of process constitutionally due to an individual is not defined by a precise, technical formula that acts independently of the factual circumstances of the case. *Lassiter v. Dep't of Soc. Services*, 452 U.S. 18, 24 (1981). Instead, a district court must comply with the Due Process Clause by determining what process is required to achieve "fundamental fairness . . . by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* at 24-25 (1981) (internal quotation marks omitted). The "several interests that are at stake" were articulated by this Court in *Mathews v. Eldridge*:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures

used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35. This Court has applied this interest-balancing test many times to determine whether the procedures of a lower court were sufficient to satisfy Due Process. See e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005); *City of Los Angeles v. David*, 538 U.S. 715, 716-17 (2003); *Gilbert v. Homar*, 520 U.S. 924, 931-32 (1997); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). More specifically, this Court has applied this test to determine what process is constitutionally due to a detainee alleged by the Executive branch to be an "enemy combatant." *Hamdi*, 542 U.S. at 528-29 (plurality opinion).

A. The private interest at stake is the most elemental liberty interest, which weighs heavily against limitations on due process.

The first factor the district court must consider is "the private interest that will be affected." *Mathews*, 424 U.S. at 334-35. This requires assessing both the *duration* and the *degree* that the individual will be deprived of his private interest. *Id.* at 341. More due process is required as the importance of the interest at stake increases. For example, our judicial system requires more due process, i.e., greater

accuracy in factfinding, for criminal trials than for civil trials because the liberty interests of a criminal defendant are of such great magnitude. *Addington v. Texas*, 441 U.S. 418, 423-24 (1979).

The weight of the private interest at stake is absolute, and it is not reduced by external factors. Specifically, the circumstances of war do not affect the weight the district court must give to the individual's private interest. *Hamdi*, 542 U.S. at 530. Likewise, the type of accusation does not affect the weight of the interest at stake, because the court must "consider the interest of [an] erroneously detained individual." *Id.* Furthermore, the weight of this interest is not diminished by the merits of the individual's substantive assertions. See *id.*; *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

In *Mathews*, the private interest at stake was the continued receipt of disability payments. *Mathews*, 424 U.S. at 341. The Court compared this private interest to the interest in receiving welfare payments, which was at issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and reasoned that because deprivation of welfare income is more detrimental than deprivation of disability income, the Constitution requires less process in the second instance. *Mathews*, 424 U.S. at 341.

In *Hamdi*, the private interest at issue was the detainee's "most elemental of liberty interests—the interest in being free from physical detention by one's own government." *Hamdi*, 542 U.S. at 529. The Court stated that the weight of the detainee's interest was "unaltered by the allegations surrounding [him] or the organizations with which he [was] alleged to have associated." *Id.* at 531. In other words, his liberty interest was not reduced merely because he was accused of being an "enemy combatant." *Id.*

Ahmed's liberty interest is identical to that of Hamdi; they share the fundamental private interest in being free from physical detention. The interest in liberty is identical whether the detainee is a citizen or a resident alien. This interest is extremely weighty, and the court should not limit Due Process when such important interests are at stake. The district court erred by failing to give sufficient weight to Ahmed's fundamental interest in liberty when determining what process was due. An evidentiary presumption in favor of the government clearly fails to give proper legal weight to the magnitude of Ahmed's liberty interest.

B. The high risk of error and the need for procedures to ensure fairness, reliability, and probative value weigh heavily against limitations on Due Process.

The second step of the *Mathews* test examines whether there is a significant risk of error and, if so, whether additional or substitute procedures would safeguard against this risk of error. *Mathews*, 424 U.S. at 334-35. We must use Due Process to prevent erroneous and arbitrary deprivations; "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 542 U.S. at 530.

In *Mathews*, the challenged procedures provided that, if there was doubt as to whether the individual receiving payments was still disabled, he was required to submit a written medical assessment of his disabled physical or mental condition to continue receiving payments. *Mathews*, 424 U.S. at 343-44. The *Mathews* Court again compared the facts to those in *Goldberg* concluding that denial of welfare payments required more process than denial of disability payments. *Mathews*, 424 U.S. at 343-44. The Court reasoned that the two were different because a welfare denial requires a court to consider a "wide variety of information," "witness credibility," and "veracity." *Mathews*, 424 U.S. at 343-44. In contrast, denial of disability payments

generally “turn[s] . . . upon ‘routine, standard, and unbiased medical reports by physician specialists.” *Mathews*, 424 U.S. at 343-44 (quoting *Richardson v. Perales*, 402 U.S. 391, 404 (1971)). Medical reports, unlike lay witness testimony, are generally reliable, probative, and rarely subject to questions of credibility. *Id.* at 343-44. Therefore, because the risk of erroneous deprivation was low and more process would not likely increase probative value, the Court limited the procedures available to the individual to the submission of written documentary evidence. *Id.* at 344 n.28.

In *Hamdi*, the parties agreed that Hamdi was captured in Afghanistan during war time. *Hamdi*, 542 U.S. at 510. The *Hamdi* Court acknowledged that, even when a detainee is captured on a foreign battlefield, the risk of mistake is substantial. *Id.* at 530. For example, Hamdi may have been a humanitarian relief worker or a journalist with a legitimate, peaceful reason for being present on a foreign battlefield. *See id.*

For Ahmed, the risk of erroneous deprivation of liberty is extremely high because he was arrested while peacefully residing in his home with his family in East Dakota. Unlike Hamdi, Ahmed was not captured on a foreign battlefield within close proximity to enemy forces. This increased risk of error weighs heavily against limitations on Due Process.

Furthermore, providing Ahmed with more process would increase probative value. Unlike the medical diagnosis question in *Mathews*, the determination of enemy combatant status does not rely on a "routine, standard, and unbiased . . . report." Instead, enemy combatant determination relies on a wide variety of information. Ahmed's Due Process should not be limited because doing so would greatly reduce the probative value.

C. The public's interest and the minimal burden on the government weigh heavily against limitations on due process.

Third, the court must weigh the public's interest, including administrative burdens and costs to society, against the previous factors to determine whether the Constitution allows any limitations to due process. See *Mathews*, 424 U.S. at 347. Although financial costs alone is not a controlling factor, the public does have an interest in "conserving scarce fiscal and administrative resources." *Id.* at 348.

In the context of enemy combatants, the *Hamdi* Court noted that the public has an interest in "detaining those who actually pose an immediate threat to the national security of the United States during an ongoing international conflict." *Hamdi*, 542 U.S. at 530. This security interest is important, but "even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building & Loan Ass'n*

v. Blaisdell, 290 U.S. 398, 426 (1934) (cited in *Hamdi*, 542 U.S. at 536). In fact, the public's interest in being free from a tyrannical government, being free from arbitrary or erroneous deprivation of liberty, and retaining the right to fairly challenge Executive-branch decisions that infringe on liberty. See *Hamdi*, 542 U.S. at 532. "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Id.*

The *Hamdi* plurality also took into account the potential burdens on the government of providing greater process to *Hamdi*. *Id.* Requiring the government to produce more evidence would have been burdensome because such evidence was "buried under the rubble of war." *Id.* Also, revealing this evidence would have "intrude[d] on the sensitive secrets of national defense." *Id.* Finally, "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away."

In *Ahmed's* case, the public has a similar interest to that discussed in *Hamdi* of maintaining national security. However, members of the general public have a very weighty interest in being free from abuse of power by the Executive branch within

their own homes. The courts should go to great lengths to protect the Due Process rights of residents who have been "captured" within their homes in the United States. Allowing limitation of due process in this context would infringe on the public's interest of being free from tyranny and arbitrary detentions.

In Ahmed's case, the burdens on the government of producing evidence are not so burdensome as to warrant limiting due process. Because Ahmed is accused of "computer hacking" and counterfeiting Social Security cards, the evidence can easily be produced by the FBI, which was the agency to investigate Ahmed. The evidence is not buried under rubble. This evidence would not expose sensitive military secrets. There is no risk of dangerous distraction to military officers waging battle "half a world away." Ahmed's offenses occurred in East Dakota, and the witnesses and evidence can be produced with minimal burden on the government. Although the public has an interest in security, its strong interest in being free from unchecked tyrannical oppression and the minimal burden on the government weigh strongly against limiting Due Process for Ahmed.

The district court erred by failing to weigh the necessary interests under *Mathews*. Admission of the Murphy Declaration, a hearsay document, and creating a presumption in favor of the

government were significant limitations on Ahmed's right to Due Process, and these procedures were not justified in this context.

CONCLUSION

For these reasons, the judgment of the Twelfth Circuit should be reversed.

Respectfully submitted,
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