

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*

BRIEF FOR PETITIONER

Team 2002

TABLE OF CONTENTS

QUESTIONS PRESENTED.....2
TABLE OF AUTHORITIES3
OPINIONS BELOW & RELEVANT STATUTORY PROVISIONS.....6
STATEMENT.....7
SUMMARY OF ARGUMENT.....9
ARGUMENT.....12
 I. THE AUMF DOES NOT AUTHORIZE PETITIONER’S INDEFINITE
 MILITARY DETENTION AS AN ENEMY
 COMBATANT.....12
 A. THE AUMF ONLY AUTHORIZES FORCE AGAINST ALLEGED
 TERRORISTS CAPTURED ABROAD NOT
 DOMESTICALLY.....12
 B. THE AUMF SHOULD BE READ NARROWLY TO AVOID CONFLICT
 WITH THE NON-DETENTION ACT, WHICH PROHIBITS
 MILITARY DETENTION OF INDIVIDUALS SUCH AS
 PETITIONER.....13
 C. PETITIONER DOES NOT QUALIFY AS AN ENEMY COMBATANT
 UNDER THE NARROW RULE ESTABLISHED BY HAMDI AND
 PADILLA.....14
 D. MILITARY DETENTION IS NEITHER NECESSARY NOR
 APPROPRIATE FOR PETITIONER, GIVEN THAT HIS ALLEGED
 CONDUCT CAN BE PROPERLY ADDRESSED THROUGH THE
 CIVILIAN CRIMINAL PROCESS.....15
 E. THE DETENTION PROVISIONS IN THE PATRIOT ACT
 SUPPLANT THE IMPLIED DETENTION PROVISIONS OF THE
 AUMF AND DO NOT ALLOW PETITIONER’S INDEFINITE
 DETENTION.....17
 II. THE CONSTITUTION PROHIBITS PETITIONER’S DETENTION...18
 A. CONGRESS HAS NOT PROVIDED THE REQUISITE CLEAR
 STATEMENT TO AUTHORIZE THE DEPRIVATION OF CIVIL
 LIBERTIES AT WARTIME.....19
 B. PETITIONER WAS WRONGLY CLASSIFIED AS AN ENEMY
 COMBATANT AND CANNOT BE INDEFINITELY DETAINED BY
 THE MILITARY.....21
 C. THE GOVERNMENT’S ACTIONS IMPERIL THE
 CONSTITUTION’S CRIMINAL PROCEDURAL SAFEGUARDS...24
 III. THE PRESIDENT LACKS INHERENT CONSTITUTIONAL AUTHORITY
 TO MILITARILY DETAIN PETITIONER.....26
 IV. PETITIONER DID NOT RECEIVE ADEQUATE PROCESS TO
 CHALLENGE HIS ENEMY COMBATANT STATUS.....28
 A. THE DISTRICT COURT FAILED TO PROPERLY APPLY
 HAMDI’S CONTEXT-SENSITIVE BALANCING TEST,
 RESULTING IN A DEPRIVATION OF ADEQUATE PROCESS FOR
 PETITIONER.....28
 B. THE CLAIM THAT PETITIONER RECEIVED ADEQUATE
 PROCESS FUNDAMENTALLY MISCONSTRUES HAMDI.....34
CONCLUSION.....36

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?

TABLE OF AUTHORITIES

Ahmed v. United States, (12th Cir. 2008) (No. 06-9701).....6

Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) vacated
sub nom Al-Marri v. Spagone, 129 S. Ct. 1545
(2009).....21, 28

Brown v. United States, 12 U.S. 110 (1816).....27

Boumediene v. Bush, 128 S. Ct. 2229 (2008)31, 33, 34, 36

Duncan v. Kahanamoku, 327 U.S. 304.....27

Erlenbaugh v. United States, 409 U.S. 239 (1972).....17

Ex Parte Endo 323 U.S. 283 (1944)20

Ex Parte Milligan 71 U.S. 2 (1866).....22, 27

Ex Parte Quirin, 317 U.S. 1 (1942)22

Eisentrager v. Johnson, 339 U.S. 763 (1950).....26

Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009)21

Greene v. McElroy, 360 U.S. 474 (1959)21

Gregory v. Ashcroft, 501 U.S. 452 (1991)20

Hamdan v. Rumsfeld, 548 U.S. 557 (2006)*passim*

Hamdi v. Rumsfeld, 542 U.S. 507 (2004).....*passim*

INS v. St. Cyr, 533 U.S. 289 (2001)20

Laird v. Tatum, 408 U.S. 1 (1972).19

Mathews v. Eldridge, 424 US. 319 (1976).....29, 30, 31, 33, 35

Myers v. United States, 272 U.S. 52 (1926).....27

Padilla v. Hanft, 423 F.3d 386 (2005) cert denied 545 U.S. 1123
(2005).15, 24

Padilla v. Rumsfeld 352 F. 3d 695, 718-20 (2d Cir. 2003).....13

Reid v. Covert, 354 U.S. 1 (1957)19

United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008).....25

United States v. Jin Fuey Moy, 241 U.S. 394 (1916).....19

United States v. Robel, 389 U.S. 258 (1967).....25

United States v. Salerno, 481 U.S. 739 (1987).....20

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).....31

United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955)
.....27

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)
.....26

Constitutional Provisions

U.S. CONST. amend. III.....20, 26

U.S. CONST. amend. IV.....20, 28

U.S. CONST. amend. V.....20, 23, 26, 28

U.S. CONST. amend. VI.....23, 28

U.S. CONST. amend. VII.....28

U.S. CONST. amend. VIII.....28

U.S. CONST. Art. I Sect. IX.20, 26, 28

U.S. CONST. Art. II Sect. II.....27

Statutes and Regulations

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

Non-Detention Act, 18 U.S.C. § 4001 (2009), Pub. L. No. 92-128,
85 Stat. 347 (1971).....13, 14

Uniting and Strengthening America by Providing Appropriate Tools
Required to Intercept and Obstruct Terrorism Act of 2001, 8
U.S.C. § 8 1226a, Pub. L. No. 107-56 § 412, 115 Stat. 272
(2001).....*passim*

War Powers Resolution, 50 U.S.C. § 1544 (2008), Pub. L. No. 93-148 § 8(a)(1) (1973).....13

Other Authorities

117 Cong. Rec. 31536.....14

Administration’s Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. On the Judiciary, 107th Cong. 21 (2001).....18

David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War, 97 Calif. L. Rev. 693 (2009).....16

Tom Daschle, Editorial, Power we Didn’t Grant, Wash. Post, Dec. 23, 2005.....18

William Douglas, A LIVING BILL OF RIGHTS (1961).....25

Richard Fallon, Jr and Daniel Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror. 120 *Harvard Law Review* 2032 (2007).....20

Homeland Defense: Hearing before the S. Comm. On the Judiciary, 107th Cong. 18 (2001).....18

John Langbein, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 102 (2005)24

James Madison, Federalist No. 47).....28

Richard Zabel and James Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008).....24

OPINIONS BELOW

The opinion of the Twelfth Circuit Court of Appeals sitting en banc is contained in the petition for a writ of certiorari.

RELEVANT STATUTORY PROVISIONS

The Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), is set forth in the petition for a writ of certiorari. R-2-3. Section 412 of 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") as codified at 8 U.S.C. § 8 1226a is set forth in pertinent part in Ahmed v. United States, (12th Cir. 2008) (No. 06-9701). R-17, n.2.

STATEMENT

This case raises the question of whether it is lawful for the President to order the indefinite military detention of individuals lawfully residing in the United States without the standard safeguards of the criminal justice system. If the Court discovers such legal authority, this case raises the question of how this Court's precedents should be applied to determine the appropriate amount of constitutionally required due process in a habeas corpus proceeding contesting Petitioner's designation as an enemy combatant.

Petitioner, Burhan Uddin Ahmed, is a citizen of Pakistan who obtained a visa to study veterinary science at Wilson University in Wilson, East Dakota. Petitioner and his family legally entered the United States on September 8, 2001. On January 3, 2002, Petitioner was arrested and detained in Wilson as a material witness in the investigation of the September 11, 2001 terror attacks. Petitioner was indicted in the District of East Dakota for making false statements to the government and possession of counterfeit Social Security cards with intent to defraud. Petitioner pled not guilty to all charges.

The District Court scheduled a hearing on pretrial motions for June 15, 2003, and scheduled trial for July 17, 2003. On June 13, 2003, the President signed an order classifying Petitioner as an enemy combatant and instructing the Attorney

General to surrender Petitioner to the Secretary of Defense. That day, the government filed an ex parte motion to dismiss the criminal indictment. The District Court granted this motion and Petitioner was immediately transferred to military custody, where he has been detained for over six years.

After his transfer to military custody, Petitioner filed a petition for a writ of habeas corpus in the District of East Dakota pursuant to 28 U.S.C. § 2241 (2000). Petitioner contested the legal justification for his detention and requested that the Government file criminal charges or release him. Alternatively, Petitioner requested a hearing to challenge the Government's assertions supporting his military detention. The Government opposed this request and proffered a hearsay document, "The Murphy Declaration," consisting of conclusory allegations that Petitioner conspired with Al Qaeda to commit terrorist acts in the United States. The District Court found that Ahmed could be detained as an enemy combatant, but determined that he was entitled to challenge the factual basis for his detention.

The District Court sent the case to a magistrate judge to evaluate the process Petitioner should be afforded to challenge his enemy combatant designation. The Magistrate accepted the Murphy Declaration as credible evidence and offered Petitioner an opportunity to rebut its factual allegations. This placed the burden on Petitioner, who responded by issuing a general denial

of the Government's claims and challenging the constitutional adequacy of both the burden-shifting scheme and the process afforded him. Due to Petitioner's failure to present evidence rebutting the Government's allegations, the Magistrate recommended dismissal of the habeas corpus petition.

Acting on the Magistrate's recommendation, the District Court dismissed the habeas corpus petition. Petitioner appealed this decision, contesting both the lawfulness of his military detention and the District Court's failure to provide adequate process. A panel of the Twelfth Circuit affirmed. Petitioner filed a motion for rehearing en banc, which the Twelfth Circuit granted. This rehearing divided the court, a plurality of which upheld his military detention under the AUMF and concluded that his Fifth Amendment rights were violated by the deficient process the District Court afforded Petitioner.

SUMMARY OF ARGUMENT

The Twelfth Circuit plurality held that Petitioner, a legal resident, can be indefinitely detained in military custody without charge or trial under a law, the AUMF, that is silent on the matter of detention, and on the basis of nothing more than a compilation of hearsay assertions. That ruling was in error.

This Court has interpreted the AUMF as implying Executive authority to militarily detain suspected terrorists. Petitioner falls outside the scope of this implied detention authority

because he was captured domestically. Insofar as the AUMF was intended to authorize the use of force in Afghanistan, the military detention of suspected terrorists captured within the United States falls outside the purview of the AUMF.

Reading the AUMF to authorize Petitioner's detention also conflicts with the Non-Detention Act's prohibition of indefinite military detention for residents of the United States. The AUMF should be read to avoid conflict with the Non-Detention Act out of deference to separation of powers and civil liberties.

Petitioner does not enjoy the privilege to fight, making his designation as an enemy combatant inconsistent with precedent. Given the norm criminal prosecution unless an individual falls within a narrow exception, Petitioner should receive a civilian criminal trial. Even if this Court accepts that Petitioner is an enemy combatant, however, the Patriot Act's detailed provisions limiting the period of time a suspected terrorist captured within the United States may be detained should control in the instant case.

The Twelfth Circuit plurality further erred by concluding that the Constitution permits Petitioner's indefinite military detention, regardless of whether Congress authorized it. First, even if Congress intended to grant the Executive such power, it failed to provide the clear statement required to authorize the deprivation of civil liberties at wartime. Second, Petitioner's

classification as an enemy combatant dramatically expands this category. Because Petitioner is not a combatant under laws-of-war and precedent, military detention unlawfully violates his due process rights. Third, the Government's actions violate the intent and purpose of the Sixth Amendment by subverting the system of adversarial criminal justice in both the instant case and future cases of alleged domestic terrorism. These concerns argue for a narrow reading of the AUMF so as to avoid constitutional concerns and if no other reading is fairly possible, call for invalidation of Petitioner's detention.

The Government's actions, moreover, cannot be justified by the President's inherent power. Acting in defiance of Congressional will, as expressed in the Patriot Act's limits on domestic military detention, such authority is at its lowest ebb in this case. In that light, Petitioner's detention violates separation of powers by infringing upon Congressional wartime control. It also intrudes upon the judicial function of securing individual rights so long as the civilian courts are open. These abuses are compounded by harm to Petitioner's rights as guaranteed by the Constitution, whose text and history clearly deny the President the power to indefinitely detain legal residents in military custody without charge.

Although the Twelfth Circuit plurality erred in upholding Petitioner's military detention, it correctly recognized that

the District Court failed to provide Petitioner with adequate process to contest his enemy combatant designation. Those judges dissenting in pertinent part are unconvincing, given that they misunderstand the meaning of a "fair opportunity" to rebut evidence, attack the plurality's "most reliable available evidence" standard even though it closely tracks this Court's precedents, and fail to appreciate the significance of the circumstances under which Petitioner was captured.

ARGUMENT

I. THE AUMF DOES NOT AUTHORIZE PETITIONER'S INDEFINITE

MILITARY DETENTION AS AN ENEMY COMBATANT

A. THE AUMF ONLY AUTHORIZES FORCE AGAINST ALLEGED

TERRORISTS CAPTURED ABROAD, NOT DOMESTICALLY

Section 2(a) of the AUMF authorizes 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 that occurred on September 11, 2001." AUMF § 2(a). Congress passed the AUMF in response to the September 11, 2001 attacks and in anticipation of the impending conflict in Afghanistan. It intended the AUMF to provide the President with authority to use necessary and appropriate force to combat terrorist organizations located overseas, not domestic terror threats.

The inclusion of section 8(a)(1) of the War Powers Resolution in Section 2(b) of the AUMF supports the proposition that the AUMF targets overseas terrorist groups. The War Powers Resolution was intended to ensure that the decision to send armed forces into hostilities would be made by the President in consultation with Congress. War Powers Resolution, 50 U.S.C. § 1544 (2008), Pub. L. No. 93-148 § 8(a)(1) (1973). Section 5(b) requires that the President withdraw forces from hostile territory if Congress has not authorized troop deployment within sixty days. War Powers Resolution § 5(a). The AUMF provides statutory authority for the presence of troops in Afghanistan. It does not authorize the Executive to declare a domestic war zone. See Hamdan v. Rumsfeld, 548 U.S. 557, 568 (2006). The AUMF's provision for the use of force abroad does not justify Petitioner's detention.

**B. THE AUMF SHOULD BE READ NARROWLY TO AVOID CONFLICT
WITH THE NON-DETENTION ACT, WHICH PROHIBITS MILITARY
DETENTION OF INDIVIDUALS SUCH AS PETITIONER**

The scope of the detention authority contained in the AUMF must be read in the context of the Non-Detention Act, Public Law 92-128, 85 Stat. 347 (1971), 18 U.S.C. § 4001 (2009). This Act prohibits military detention of individuals seized within the United States absent a clear statement from Congress. See Padilla v. Rumsfeld 352 F. 3d 695, 718-20 (2d Cir. 2003).

The Non-Detention Act explicitly applies to citizens. Congressional debates over its passage, however, demonstrate that provisions of the Non-Detention Act also apply to resident aliens seized in the United States. During debates over the Non-Detention Act's passage, concerns were raised that the Act would limit Executive authority to militarily detain aliens captured in the United States. 117 Cong. Rec. 31536 (statement of Rep. H. Allen Smith). Notwithstanding such concerns, Congress enacted the legislation and thereby limited Executive detention authority over individuals such as Petitioner.

Broadly reading the AUMF to authorize Petitioner's indefinite military detention amounts to judicial abrogation of the Non-Detention Act and conflicts with limitations on detention already established by Congress. The AUMF should therefore be read narrowly to avoid this conflict.

C. PETITIONER DOES NOT QUALIFY AS AN ENEMY COMBATANT

UNDER THE NARROW RULE ESTABLISHED BY HAMDI AND PADILLA

In Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004), this Court upheld the indefinite military detention of an American citizen captured while fighting against American and allied troops in Afghanistan. The Hamdi plurality reasoned that the "necessary and appropriate force" language of the AUMF implied detention authority for enemy combatants, Id. at 517-18, a category narrowly defined as 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," 542 U.S. at 518 (internal citations omitted). The Court reasoned that the AUMF authorized Hamdi's detention "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." Hamdi, 542 U.S. at 519.

This Court anticipated the Government's broad reading of detention authority, clarifying that "Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." Id. In Hamdan, 548 U.S. at 566, 568, this Court reaffirmed that enemy combatants must have taken up arms in support of the enemy on a foreign battlefield. In Padilla v. Hanft, 423 F.3d 386, 389, 391 (2005) cert denied 545 U.S. 1123 (2005), the Fourth Circuit upheld Padilla's enemy combatant designation because he "took up arms" in support of the enemy in Afghanistan and to prevent his return to the battlefield. Petitioner would not qualify as an enemy combatant under the Hamdi definition or for purposes of the AUMF because he has never taken up arms against the United States or its allies, making his military detention unnecessary.

**D. MILITARY DETENTION IS NEITHER NECESSARY NOR APPROPRIATE
FOR PETITIONER, GIVEN THAT HIS ALLEGED CONDUCT CAN BE
PROPERLY ADDRESSED THROUGH THE CIVILIAN CRIMINAL PROCESS**

Because the detention authority contained in the AUMF arises by implication, interpreting it as authorizing the detention of terrorists captured within the United States risks expanding Executive authority beyond the scope envisioned by Congress. As its legislative history indicates, Congress intended the AUMF to address the threat posed by terrorist organizations abroad, not to supplant the criminal process for citizens or legal resident aliens captured in the United States.

The sufficiency of the criminal process for addressing the alleged threat posed by Petitioner makes his indefinite military detention neither "necessary" nor "appropriate," as required by the AUMF. There is a strong presumption that the criminal process is the preferred means for responding to dangerous behavior. David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War, 97 Calif. L. Rev. 693, 697 (2009). Extraordinary measures such as preventive military detention of enemy combatants should only be used when the criminal process would fail to address safety concerns. Id. Detention of enemy combatants, as defined by the laws of war, is necessary because soldiers of foreign governments are privileged to fight pursuant to international law. Id.

In Petitioner's case, the Government had secured a criminal indictment and stood on the eve of trial when the President designated Petitioner an enemy combatant. The criminal process

could have successfully addressed any alleged danger posed by Petitioner, thus making his military detention unnecessary and outside the scope of the AUMF. Even though convictions are never guaranteed, the criminal process remains the preferred means for responding to dangerous social behavior. This Court should reject the Government's argument, the logical endpoint of which is preventative indefinite military detention for anyone that it asserts plans to engage in acts of domestic terrorism.

E. THE DETENTION PROVISIONS IN THE PATRIOT ACT SUPPLANT THE IMPLIED DETENTION PROVISIONS OF THE AUMF AND DO NOT ALLOW PETITIONER'S INDEFINITE DETENTION

Congress enacted the Patriot Act within weeks of the AUMF. The two pieces of legislation should therefore be read in concert. See, e.g., Erlenbaugh v. United States, 409 U.S. 239, 243-44 (1972) (finding that subsequent legislation must be read in tandem with earlier legislation to resolve ambiguities). Whereas the AUMF is silent on the subject of detaining suspected terrorists captured in the United States, the Patriot Act provides that the Attorney General may seize these individuals. The Attorney General must, however, begin "removal proceedings" or "charge the alien with a criminal offense not later than seven days after the commencement of such detention." Patriot Act § 412(a)(5). The plain language of the Patriot Act addresses Petitioner's precise situation and should therefore control.

Legislative history supports this conclusion. The Bush administration requested that Congress provide it with broad authority to militarily detain resident aliens suspected of terrorism, but members of both parties objected and questioned the constitutionality of such a grant. See, e.g., Homeland Defense: Hearing before the S. Comm. On the Judiciary, 107th Cong. 18, 26, 28 (2001); Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. On the Judiciary, 107th Cong. 21, 40, 54 (2001). No member of Congress suggested that the AUMF already included such detention authority.

To protect guarantees of criminal process for civilians, Congress rejected the Bush administration's suggestion that the AUMF include additional words after "appropriate force" to expand detention authority to suspected terrorists captured on US soil. The Senate thus refused "to accede to this extraordinary request for additional authority." Tom Daschle, Editorial, Power we Didn't Grant, Wash Post, Dec. 23, 2005.

Petitioner contends that the AUMF does not provide authority to classify him as an enemy combatant. Even if this Court accepts that classification, however, the Patriot Act's provisions for the detention of combatants seized in the United States foreclose Petitioner's indefinite military detention.

II. THE CONSTITUTION PROHIBITS PETITIONER'S DETENTION

The AUMF should be interpreted in such a manner as to avoid serious constitutional concerns. See, e.g., United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also to avoid grave doubts upon that score.”). Given the numerous constitutional issues raised by the instant facts, this general principle of statutory interpretation militates in favor of reading the AUMF as not authorizing Petitioner’s detention. If the Court does not find it fairly possible to construe the AUMF in this manner, however, Petitioner’s indefinite military detention must still be invalidated on constitutional grounds.

**A. CONGRESS HAS NOT PROVIDED THE REQUISITE CLEAR STATEMENT
TO AUTHORIZE DEPRIVATION OF CIVIL LIBERTIES AT WARTIME**

This Court has long recognized a “deeply rooted and ancient opposition in this country to the extension of military control over civilians.” Reid v. Covert, 354 U.S. 1, 33 (1957). The Framers sought to “keep the military strictly within its proper sphere, subordinate to civil authority,” Id. at 30, and Americans have historically resented “any military intrusion into civilian affairs.” Laird v. Tatum, 408 U.S. 1, 15 (1972).

Due to a strong presumption against domestic military jurisdiction over civilians, departures from this tradition require compelling justification. “The protracted detention of

citizens can normally be justified only pursuant to the substantive and procedural safeguards of the criminal law.” Richard Fallon, Jr. and Daniel Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 Harv. L. Rev. 2032, 2067 (2007). Structurally, the Fourth U.S. CONST. amend. IV and Fifth Amendments U.S. CONST. amend. V, joined by the Suspension Clause U.S. CONST. Art. I Sect. IX, animate this presumption by making criminal prosecution, conviction, and incarceration the ordinary response to dangerous conduct. Combatants comprise one of few exceptions to this rule.

The Government argues that the implied detention provisions of the AUMF extend to Petitioner. This broad reading of the AUMF is inconsistent with a corpus of constitutional law that tolerates deprivation of civil liberties only under very narrow circumstances. See United States v. Salerno, 481 U.S. 739, 755 (1987); Hamdi, 542 U.S. at 530. The Due Process Clause guarantees timely criminal prosecution for those arrested inside the United States, and only through a “clear statement” may Congress limit this right. INS v. St. Cyr, 533 U.S. 289, 299–300 (2001); See, e.g., Ex Parte Endo, 323 U.S. 283, 300 (1944) (finding that a statute limiting liberties to address the exigencies of war shall not be interpreted beyond its clear language); Gregory v. Ashcroft, 501 U.S. 452, 461 (1991); Greene

v. McElroy, 360 U.S. 474, 507 (1959). Separation of powers must therefore inform any reading of the AUMF.

The absence of explicit statutory authorization for detention in the AUMF has made it difficult to determine the scope of its implied detention authority. Consequently, in the wake of Hamdi, lower courts have produced fragmented and conflicting standards for determining enemy combatant status. See, e.g., Al-Marri v. Pucciarelli, 534 F.3d 213, 217 (4th Cir. 2008) vacated sub nom Al-Marri v. Spagone, 129 S. Ct. 1545 (2009); Gherebi v. Obama, 609 F. Supp. 2d 43, 70 (D.D.C. 2009). This confusion demonstrates that, although the Government's proposed expansion of Executive power depends upon a broad reading of "necessary and appropriate" in the AUMF, this language is anything but clear. To the contrary, the Government's reading strains the AUMF's textual boundaries and leaves unresolved a host of questions about which other powers may be discovered therein. Congress has not, therefore, provided the "clear statement" requisite to the exercise of the Executive powers that purport to justify Petitioner's indefinite detention. Al-Marri, 534 F.3d at 242 (Mozt, J., concurring).

**B. PETITIONER WAS WRONGLY CLASSIFIED AS AN ENEMY COMBATANT
AND CANNOT BE INDEFINITELY DETAINED BY THE MILITARY**

The Government's argument also fails because Petitioner was wrongly classified as an enemy combatant. Seized peacefully at

home, in the company of family and far from any battlefield, Petitioner's detention rests entirely upon the assertion that he supported and planned to engage in terrorist activities. This detention violates precedent and law-of-war principles.

In Ex Parte Milligan, 71 U.S. 2, 6, 130 (1866), this Court rejected military detention notwithstanding President Lincoln's belief that petitioner conspired with the Confederacy to commit warlike acts. Noting that military tribunals pose "dangers to human liberty [that] are frightful to contemplate," the Court held that, so long as the "courts are open and their processes unobstructed," the Constitution requires civilian trials and the protections of their procedural safeguards. Id. at 125.

This rule survived Ex Parte Quirin 317 U.S. 1 (1942), a case that "represents the high-water mark" of domestic military jurisdiction. Hamdan, 548 U.S. at 597 (Stevens, J., concurring). In Quirin, the Court allowed military jurisdiction over spies who conceded membership in the armed forces of an enemy nation and had entered the United States in full dress uniform to commit a recognized war crime. Quirin, 317 U.S. at 21.

These facts sharply define the boundaries of Quirin's authorization of detention without charge or trial, and render it inapposite to this case. First, Ahmed is accused of association with a terrorist organization, not an enemy government. Second, as a legal immigrant, Ahmed enjoys

constitutional protections unavailable to enemy aliens. Third, Ahmed has not been charged with any violation of the laws of war. Fourth, Ahmed denies the charges against him.

Written under conditions of extraordinary pressure and issued after six of its eight petitioners had already been executed, Quirin has been widely criticized. See, e.g., Hamdi, 542 U.S. at 569 (Scalia, J., dissenting) (“[Quirin] was not this Court’s finest hour”). Quirin should either be limited to its narrow facts or, if the Court sees no alternative, overruled. The Twelfth Circuit erred in dramatically expanding its scope.

This Court has recently clarified the “limited category” of enemy combatant, Hamdi, 542 U.S. at 518, invoking international laws of war that permit detention of armed soldiers captured on a battlefield where, alongside enemy government forces, they are engaged in battle against American and allied troops. Id. at 518-22. Ahmed was not captured under such circumstances, nor under circumstances even remotely similar, and is not an enemy combatant under any definition recognized in American law.

Petitioner’s detention is therefore unconstitutional. He must be charged and tried in a civilian court, or he must be released from military custody forthwith. This requirement flows from the Fifth Amendment’s Due Process Clause U.S. CONST. amend. V and the Sixth Amendment’s criminal process guarantee U.S. CONST. amend. VI, both of which have been violated in this case.

**C. THE GOVERNMENT'S ACTIONS IMPERIL THE CONSTITUTION'S
CRIMINAL PROCEDURAL SAFEGUARDS**

The Sixth Amendment was specifically intended to apply to high security detainees such as Petitioner. Madison based its text on the 1696 English Treason Trials Act, a law whose protections were originally restricted to those accused of threatening national security, and extended those guarantees to all instead of denying them to the dangerous. John Langbein, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 102 (2005). Many commentators agree, arguing that "the criminal system is reasonably well equipped to handle most international terrorism cases." See, e.g., Richard Zabel and James Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008) 2.

Absent a ruling to the contrary, there is no guarantee that the Government will make limited use of its power to militarily detain citizens. This would allow the Government to threaten transfer to military detention in future cases, disrupting the framework of procedural safeguards contemplated by the Framers to shape adversarial negotiation. Jose Padilla, who was shuttled back and forth between military and civilian custody, exemplifies this concern. See Padilla v. Hanft, 432 F.3d 582, 583-584 (4th Cir. 2005); See also Padilla v. Hanft, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of

cert.) (noting "a continuing concern that his status might be altered again"). Transfer to military custody might also be used to collect information through methods that would be otherwise inadmissible under criminal procedure. See, e.g., United States v. Abu Ali, 528 F.3d 210, 229-34 (4th Cir. 2008) (upholding admissibility of incriminating statements made by a United States citizen during detention in Saudi Arabia). The perceived expediency of such methods would loom over future domestic terrorism cases, rendering the Sixth Amendment's protections uncertain. If the category of 'combatant' continues to expand beyond its traditional moorings, Ahmed may become the first of many individuals whose rights are threatened by an enervation of these safeguards. As Justice Douglas warned, "The liberties of none are safe unless the liberties of all are protected." William Douglas, A LIVING BILL OF RIGHTS 64 (1961).

"It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make[] the defense of the Nation worthwhile." United States v. Robel, 389 U.S. 258, 264 (1967). Recognizing that "the very core of liberty . . . has been freedom from indefinite imprisonment at the will of the Executive," Hamdi, 542 U.S. at 554-55 (Scalia, J., dissenting), the Government must charge Petitioner in the civilian courts or bow to the constitutional command that he be released.

III. THE PRESIDENT LACKS INHERENT CONSTITUTIONAL AUTHORITY TO MILITARILY DETAIN PETITIONER

Petitioner cannot be lawfully detained by the President under inherent Article II Commander-in-Chief Clause powers. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952). Here, as already demonstrated, the President lacks Congressional authorization under the AUMF and acts in defiance of the Patriot Act's limits on indefinite detention. The Government's claim must therefore be "scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." Id. at 634.

The Commander-in-Chief Clause provides the President with "command of the [armed] forces and the conduct of [military] campaigns." Milligan, 71 U.S. at 139. This power, however, is shared extensively with Congress. See Eisentrager v. Johnson, 339 U.S. 763, 788 (1950) ("Out of seventeen specific paragraphs of congressional power . . . eight of them are devoted in whole or in part to specification of powers connected with warfare."). As Justice Jackson argued in Youngstown Sheet & Tube Co. v. Sawyer, citing the Third Amendment, Fifth Amendment, and Suspension Clause, the authority to limit civil liberties at wartime resides primarily with Congress. 343 U.S. at 644-50.

Once Congress acts, as it did with the Patriot Act, the President's Article II authority does not permit him to "disregard limitations that Congress has, in proper exercise of its own powers, placed on his powers." Hamdan, 548 U.S. at 592, n. 23. Historical support for this position can be found in the Alien Enemy Act of 1798, which authorized the President to impose domestic military detention during an undeclared naval war with France. As this Court reasoned in Brown v. United States, 12 U.S. 110, 126-27 (1816), such action presumed a lack of inherent Presidential power.

The Government's position also infringes upon the judicial branch. Even during times of war, so long as the courts remain open, the judiciary has historically affirmed its duty to protect the constitutional rights of individuals against arbitrary Executive action. See, e.g., Duncan v. Kahanamoku, 327 U.S. 304, 315-16; Milligan, 71 U.S. at 122. Absent Congressional suspension of habeas corpus, the Executive cannot unilaterally circumvent civilian judicial process and act as judge and jury for its own allegations by detaining citizens indefinitely. See United States ex rel. Toth v. Quarles, 350 U.S. 11, 14 (1955).

"The doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power . . . and to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926). The

Government's novel claim to inherent presidential power would allow the President to "eliminate constitutional protections with the stroke of a pen by proclaiming a civilian . . . an enemy combatant subject to military detention." Al Marri, 534 F.3d at 250-1 (4th Cir. 2008) (Motz, J., concurring). This is precisely the kind of power the Constitution is designed to constrain. James Madison, Federalist No. 47 ("[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."). The Government's breathtaking claim of inherent Presidential power to militarily detain Petitioner offends the Suspension Clause and Due Process Clause, the liberties of person and process protected by the Fourth, Fifth, Sixth, Seventh, and Eight Amendments, and separation of powers. It should therefore be rejected as both a violation of the Constitution and an invitation to abuses of power.

IV. PETITIONER DID NOT RECEIVE ADEQUATE PROCESS TO CHALLENGE HIS ENEMY COMBATANT STATUS

A. THE DISTRICT COURT FAILED TO PROPERLY APPLY HAMDI'S CONTEXT-SENSITIVE BALANCING TEST, RESULTING IN A DEPRIVATION OF ADEQUATE PROCESS FOR PETITIONER

"The question of what process is constitutionally due a [person] who disputes his enemy-combatant status" has been addressed most recently in Hamdi. 542 U.S. at 524. Analysis in

that case turned upon a "tension that often 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." Id. at 528. The individual's interest was held to be "the most elemental of liberty interests – the interest in being free from physical detention." Id. at 529. The Government, however, asserted "equally compelling" concerns, Id. at 530, including 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, and in "ensuring that those who have in fact fought with the enemy during a war do not return to battle," Id. at 531.

Rather than give either interest absolute priority, the Hamdi plurality looked to the balancing test first articulated in Mathews v. Eldridge, 424 US. 319, 335 (1976) and held that due process must be determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burden the Government would face in providing greater process. Id. The Mathews calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of

additional or substitute procedural safeguards.” Hamdi, 542 U.S. at 429 (internal citations omitted)(quoting Mathews, 424 U.S. at 335). At a minimum, however, the Hamdi plurality concluded that “a citizen-detainee seeking to challenge his classification must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.” 542 U.S. at 533.

The Hamdi plurality’s application of this test demonstrates its context-sensitivity. Given the circumstances of Hamdi’s battlefield capture, the Government argued that “military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation . . . 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,” Id. at 531-2. The plurality referred to these specific claims when it noted that “the exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” Id. at 533. This willingness to lessen the constitutionally required due process for Hamdi, notably by permitting hearsay evidence and a rebuttable presumption in favor of the government’s evidence, Id. at 533, represented a tipping of the Mathews scale toward the Government

in recognition of the weighty, situation-specific burdens associated with Hamdi's seizure and detention.

Hamdi did not announce a fixed standard of due process; rather, it articulated and applied a fact-responsive method of analysis that links due process requirements to the individual circumstances of each case. As affirmed in Boumediene, "common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances." 128 S. Ct. at 2267. Given that, as a legal immigrant, Petitioner is entitled to the same due process as a US citizen, United States v. Verdugo-Urquidez, 494 U.S. 259, 264-66 (1990), the District Court should have performed a full Mathews analysis to determine an appropriate level of due process. Instead, the District Court merely replicated Hamdi's end-result – thus reaching a conclusion that the Hamdi plurality considered appropriate to circumstances in which the Government faced a high burden if required to provide normal due process.

Petitioner's circumstances differ materially from Hamdi's, thereby tipping the Mathews scale in his favor and dictating a constitutional obligation to provide greater process. Whereas Hamdi was seized on a battlefield in Afghanistan while engaged in combat against American and allied troops, Hamdi, 542 U.S. at 510, Petitioner was seized peacefully and unarmed at his home. Unlike Hamdi, Petitioner faced criminal charges in a civilian

court before his transfer to military custody. The crimes of which he is accused, moreover, include planning to engage in terrorist activities – not of fighting alongside enemy forces.

These differences redefine the balance of individual versus Government interests contemplated by Hamdi as crucial to the determination of adequate due process. Whereas further discovery in Hamdi might have distracted the military, raised national security concerns, and required a search for evidence “beneath the rubble of war,” Id. at 532, all or most records that Petitioner seeks through discovery are held by civilian agencies. More extensive discovery therefore poses little danger of interfering with military operations or the Executive’s war powers, especially if properly supervised by a district judge. Even as the Government’s burden has been dramatically lightened, moreover, the threat to Petitioner’s liberty has increased: “[T]here is a much greater risk of misidentifying a civilian as an enemy combatant in this context”. R-27.

The District Court failed to recognize these differences. It would allow the indefinite military detention of US citizens and legal immigrants to follow proceedings where the Government’s evidence consists of a hearsay compilation by one mid-level Government official, who bases his assertions entirely upon ex parte examination of unnamed sources and unidentified documents. Such methods are the stuff of Star Chamber, not of

Fifth Amendment due process rights, especially when the Government has made no showing of an undue burden. The District Court must at least make this inquiry and perform a Mathews analysis, rather than uncritically accepting the Murphy Declaration. As recognized in Hamdi, the Constitution rejects an “unchecked system of detention [that] carries the potential to become a means for oppression and abuse.” 542 U.S. at 530.

The Supreme Court has repeatedly affirmed its expectation that district courts will play an active role in shaping the development of due process standards. See, e.g., Hamdi, 542 U.S. at 539 (“We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”); Boumediene v. Bush, 128 S. Ct. 2229, 2276 (2007) (“evidentiary and access-to-counsel issues ... are within the expertise and competence of the District Court”). This expectation implicitly credits the ability of district courts to recognize the complex and context-sensitive interests involved in each case, and to strike an appropriate balance guided by Mathews, Hamdi, and Boumediene.

The Twelfth Circuit plurality correctly held that the District Court must assess these interests and arrive at a level

of case-specific process appropriate to Petitioner. To do otherwise would defeat the balancing framework established by Hamdi and deprive Petitioner of his Fifth Amendment rights.

B. THE CLAIM THAT PETITIONER RECEIVED ADEQUATE PROCESS

FUNDAMENTALLY MISCONSTRUES HAMDI

Dissenting in pertinent part from the Twelfth Circuit plurality, Judges Morrison, Baker, and Chen conclude that Petitioner has received constitutionally adequate process. They rest their argument on three claims: that each of the Hamdi requirements has been satisfied, that the “most reliable available evidence” standard misunderstands Hamdi, and that the location of capture is irrelevant to due process. None of these claims withstands careful scrutiny.

Petitioner did not receive a “fair opportunity to rebut the Government's factual assertions.” Hamdi, 542 U.S. at 533. Although the Magistrate judge did promise full adversarial process if he could refute the Government's allegations, it seems implausible that Petitioner, without full discovery, could refute a set of factual assertions grounded in ex parte review of unidentified documents and unnamed witnesses. Recognizing the deficiency of these procedures, Petitioner instead issued a general denial of the charges against him.

To allege that the real issue here is his refusal to mount an active defense under these terms is to miss a far more

important point. As stated in Boumediene, "the habeas privilege entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." 128 S. Ct. at 2266 (internal citations omitted). Deprived of standard discovery procedures, none of which have been shown to unduly burden the Government, Petitioner lacked a 'meaningful' or 'fair' opportunity to rebut the series of hearsay assertions leveled against him.

The Twelfth Circuit plurality, citing Hamdi, employs a "most reliable available evidence" standard. R-23. Properly understood, this simply rephrases Hamdi's basic holding. As applied by the plurality, this standard should be understood to mean 'most reliable available evidence' given the competing interests recognized in Hamdi and weighed by Mathews. On this view, the Twelfth Circuit plurality simply used that phrase as shorthand for the Hamdi's plurality's recognition that there exists a presumption in favor of full process unless important Government interests require that, in some circumstances and as weighed against individual liberty interests, less be afforded. This phrase hardly constitutes a novel test, nor does it limit the district court's authority any more than Hamdi.

The circumstances of Petitioner's capture are important to the proper weighing of individual versus Government interests under Hamdi and Mathews. The fact that Petitioner was not seized

on a battlefield is not dispositive. Rather, considerations that attend this fact – including the lack of any burden to military personnel or war powers and the accessibility of evidence under civilian control – are what really matter. It is these points that reshape due process analysis, and it is these factors that the District Court erred in dismissing.

“The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.” Boumediene, 128 S. Ct. at 2244. Petitioner’s basic liberties are threatened by inadequacy of process, a constitutional deficiency that the Twelfth Circuit plurality sought to redress in a section of its opinion that this Court should affirm.

CONCLUSION

For the reasons contained herein, Petitioner respectfully requests that this Court enter an order reversing the judgment below that Petitioner has been lawfully detained by the Executive and remanding with instructions that the habeas corpus petition be granted and the government be directed to release Petitioner from military custody forthwith. Should the Court decline to offer such relief, the judgment below that Petitioner has not received constitutionally sufficient process to contest his designation as an enemy combatant should be affirmed.