

No. 08-11144

IN THE
SUPREME COURT OF THE UNITED STATES

BURHAN UDDIN AHMED
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

BRIEF FOR PETITIONER

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

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?

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STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court dismissed Ahmed's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in June, 2003. The Twelfth Circuit's opinion was rendered on November 28, 2008.

STATUTES INVOLVED

The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), is set forth at App. 490a-492a. Section 412 of the P.A.T.R.I.O.T. Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), as codified at 8 U.S.C. § 1226a, is set forth in relevant part at App. 493a-496a. The Federal Habeas Corpus statute is set forth at 28 U.S.C. § 2241 et seq.

STATEMENT OF THE CASE

This case involves the extended military detention of Petitioner Burhan Uddin Ahmed ("Petitioner" or "Ahmed"), based on the President's allegation that he is an enemy combatant in the war on terror. Ahmed is a citizen of Pakistan who lawfully entered the United States of America on September 8, 2001, to pursue a graduate degree in Veterinary Medicine at Wilson University in the state of East Dakota. Because of his designation as an enemy combatant, Ahmed has been held by military authorities, without charge, for over six years.

I. FACTUAL BACKGROUND

On January 3, 2002, Federal agents investigating the September 11, 2001 terrorist attacks detained Ahmed as a material witness in Wilson, East Dakota. In November 2002, Ahmed was charged in a criminal indictment with possession of counterfeit Social Security cards with intent to defraud. The criminal complaint was amended in January 2003 to charge Ahmed with making a false statement to the FBI. Ahmed's criminal trial was set for July 17, 2003. On June 9, 2003, the District Court scheduled a pretrial motion hearing for June 15, 2009. The docket for the hearing included a motion by Ahmed to suppress evidence that he alleged had been obtained through torture. Before the hearing could take place, the Government moved *ex parte* on June 13, 2003, to dismiss the indictment against Ahmed

and transfer him into the custody of the Secretary of Defense. The District Court granted the motion pursuant to the President's June 13, 2003 determination that Ahmed was subject to indefinite military detention as an alleged "enemy combatant."

II. PROCEDURAL HISTORY

Ahmed petitioned for a writ of habeas corpus after his transfer into military custody at the Army Regional Consolidated Detention Facility in Souds, East Dakota. Ahmed alleged that his detention was unlawful because, as a criminal defendant, he was entitled to be tried or released. In the alternative, he argued that he must be afforded an opportunity to challenge the President's factual determination that he is an enemy combatant subject to indefinite military detention.

The government opposed Ahmed's petition on both grounds, and supported its argument with the hearsay declaration of the Director of the Joint Task Force for Combating Terrorism, John R. Murphy ("Murphy Declaration"). The Murphy Declaration alleged that Ahmed had, among other things, attended an al Qaeda training camp, that he had "relationships" with senior leaders of al Qaeda, that he was a sleeper agent, received financial support from al Qaeda, and was instructed to investigate the plausibility of raising revenue for terrorism and disrupting the

American social safety net by perpetrating social security fraud. He was not accused of fighting alongside Taliban forces in Afghanistan, directly participating in hostilities against the United States, or of affiliation with a State with which the United States was actively at war at the time of his capture. The District Court agreed with Ahmed that the Constitution entitled him to an opportunity to challenge the factual basis of his detention. It then directed a Magistrate Judge to consider what procedural mechanisms were constitutionally required. The Magistrate Judge held that Ahmed had received notice of the government's allegations - supported by only the hearsay Murphy Declaration - and required him to rebut the presumption that his detention was lawful with more persuasive evidence. Ahmed responded with a blanket denial of the government's allegations and asserted that he had been denied due process. The District Judge agreed with the Magistrate Judge that Ahmed's denial, which he could not support with evidence that the government withheld, was insufficiently persuasive to overcome the presumption against him and dismissed Ahmed's petition.

Ahmed then appealed to the Court of Appeals for the Twelfth Circuit, arguing that the President lacked inherent or statutory authority to detain him indefinitely as an enemy combatant, and that the procedures afforded to him in the challenge proceedings below were constitutionally inadequate. A panel of the Twelfth

Circuit voted to affirm the District Court. The Court then accepted Ahmed's petition for a rehearing *en banc*. In a fractured set of opinions, five judges agreed that the President had statutory authority to hold persons in Ahmed's position as enemy combatants under the September 18, 2001 Authorization for the Use of Military Force. The *en banc* panel remanded the case to the District Court, however, because it found that Ahmed had not received a constitutionally adequate opportunity to challenge his designation as an enemy combatant.

SUMMARY OF ARGUMENT

In deciding that Ahmed's continued detention is lawful under the AUMF, the Twelfth Circuit erred in five distinct ways.

First, non-combatants living in the United States are not subject to the laws of war and military detention, unless specifically authorized by congress, and must instead be tried by civilian courts. The Twelfth Circuit, by allowing the President powers to detain any person, regardless of direct engagement in hostilities, ignores the strict limits this Court has placed on the circumstances under which an individual in the United States may be subject to military authority.

Second, the intent of Congress in the AUMF, as reinforced by the Patriot Act, is that individuals suspected of terrorism residing in the United States may not be subject to indefinite military detention. Instead the Twelfth Circuit expands the purview of the AUMF to be unreasonably broad, including in its scope military action against any individual residing in the United States who is accused by the Executive Branch of any affiliation with al Qaeda.

Third, the President lacks inherent authority under the Constitution to designate and detain a civilian legally residing in the United States, because of the express limits Congress applied to this type of detention.

Fourth, the law of war with regard to the designation of combatants in this circumstance is clear. Classification of Ahmed as an unlawful combatant leads to a result that offends the law of war and this Court's directive that the power to detain under the AUMF must follow these established principles.

Finally, the Twelfth Circuit, through sanctioning the continued detention of a civilian after exhaustive interrogations, where the individual was not engaged in hostilities, clearly contravenes the explicit intent of Congress to authorize only "necessary and appropriate" military force. As Ahmed had never taken up arms against the United States, was effectively detained by Federal law enforcement agents, and could have been processed in the civilian criminal justice system, the use of military measures against him did not fall within the spectrum of "necessary and appropriate" military force.

The Twelfth Circuit Court of Appeals correctly concluded that the District Court did not provide Ahmed with sufficient procedural mechanisms to challenge his designation as an enemy combatant. The District Court, in its burden-shifting framework and refusal to demand a non-hearsay evidentiary showing from the government, improperly applied the principles outlined in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The factors that allowed for

the curtailment of procedural Due Process in Hamdi's case are not present in this case.

ARGUMENT

I. The President Lacks Statutory or Inherent Constitutional Authority to Detain Petitioner Burhan Uddin Ahmed

The first question presented in this case implicates fundamental liberty interests of all civilians residing in the United States, both citizen and non-citizen. The reasoning of the court below would sustain indefinite military detention of any person the U.S. government accused of "association with" al Qaeda who has taken any alleged "steps" to support it. This violates fundamental constitutional principles, the intent of congress, and the law of war. This Court should therefore reverse the decision of the Twelfth Circuit Court of Appeals on the scope of Presidential authority to detain Ahmed as an "enemy combatant."

A. The Twelfth Circuit Contradicts Precedent That Exempts Civilians in the United States From The Law Of War and Military Detention

The first question presented regards the limits on presidential authority to detain individuals lawfully residing in the United States who have not taken up arms against the United States. Our constitution recognizes that the act of depriving an individual of liberty demands protection against excessive government action. U.S. Const. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law."). As a "general rule" the government may not

detain a person prior to a judgment of guilt in a criminal trial. *United States v. Salerno*, 481 U.S. 739, 749.

Courts have established as a narrow exception to that rule for the detention of enemy combatants in the current war with al Qaeda and other terrorist groups. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517. (Limiting the scope of their holding to those who "engaged in an armed conflict against the United States"). The *Hamdi* court recognized that detention of persons clearly identified as enemy combatants is incidental to waging war. *Id.*

Despite this expanded authority, even in wartime there are distinct limits to presidential powers over civilians where those individuals are not participating in hostilities. *Ex Parte Milligan*, 71 U.S. 2. During the Civil War, Milligan, a civilian citizen of Indiana, a non-belligerent state, was accused of plotting to steal Union arms to raid prisoner of war camps to free Confederate captives. *Id.* at 17, 107. Despite the fact that civilians within this country may be "dangerous enemies" who carry out "enormous crime[s]" against the state, this Court nonetheless held that these individuals may not be subject to military control and deprived of constitutional rights. *Id.* at 120, 131. Because of the serious constitutional implications raised by the military detention and trial of a civilian, all nine justices agreed that such prosecution was illegitimate. *Id.* at 135. The majority found that the constitution demanded trial

in a civilian court, while a minority of Justices reached the same result by demanding that Congress must act in express terms to authorize military jurisdiction over Milligan. *Id.* at 135 (Chase, C.J., concurring in the judgment). Thus both the majority and the concurrence in *Milligan* set forth a strong presumption for civilian criminal processes even in times of war.

Neither *Hamdi* nor *Padilla* undermine the fundamental principal presented in the *Milligan* decision. Both decisions explicitly recognized the non-civilian nature of the individuals detained. In *Hamdi*, the Court determined only that the AUMF authorized the detention of individuals "based on longstanding law-of-war principles." *Hamdi*, 542 U.S. at 521. Capture of an individual bearing arms on a foreign battlefield engaged in "active combat" alongside fighters of a state with which we are at war was sufficient grounds for the President to detain him as an enemy combatant. *Id.* In distinguishing *Milligan* the court noted that the circumstances of capture, where Milligan was not actively engaged in battle, were essential to the analysis of combatant status. *Id.* at 520. *Hamdi* thus preserved the principle that civilians not engaged in combat operations are not subject to military procedures.

Though not binding, the circumstances in *Padilla* are consistent with *Milligan* and illustrative here. In *Padilla* the

Fourth Circuit determined that *Milligan* was still binding authority where an individual has not "taken up arms against the forces of the United States on behalf of an enemy of the United States". *Padilla v. Rumsfeld*, 423 F. 3d 386 at 396. The relevant distinction is based on the actual status of the individual as a belligerent, having taken up arms against the U.S. It is in this context that the Court in both *Hamdi* and *Padilla* ruled that an "enemy combatant" may be detained indefinitely by the United States.

Finally, the Government rests heavily on the decision in *Ex Parte Quirin* to assert that unlawful enemy combatants, even if citizens, may be subject to military jurisdiction. However, the decision in *Quirin* does not undermine the ruling in *Milligan*. In *Quirin*, four Nazi spies, one an American citizen, came to the United States to destroy military property during World War Two. *Ex Parte Quirin*, 317 U.S. 1, 20. By engaging in espionage for an enemy power, these parties were not only explicitly combatants, but had committed war crimes, and were thus subject to military jurisdiction. *Id.* at 29. Though one party in *Quirin* was a citizen, *Milligan* was clearly distinguishable because all of the detained individuals in *Quirin* were formal members of the military of Nazi Germany. *Id.*

No decision of this court has overturned the fundamental principle of *Milligan*. Recent decisions diverging from *Milligan*

have turned on narrow and unique factual circumstances. It remains the rule that civilians in the United States who are neither members of an enemy military, nor have taken up arms against the Government, are not subject to military jurisdiction. *Milligan*, 71 U.S. at 131. As Congress has not expressly authorized the military detention of civilians legally residing in the United States, *Milligan* should be binding on the facts of this case and Ahmed should be remanded into the custody of the Department of Justice. Congressional silence regarding detention in the AUMF should not be read to undermine the liberty interests of legal residents in the United States, whom the Government admits have not actively participated in hostilities.

B. Congress Did Not Authorize Detention of Civilians in the United States on the Basis of Alleged Membership in an Organization

In its conclusion that civilian terror suspects on domestic soil automatically fall under the scope of the AUMF, the Twelfth Circuit improperly expanded war powers beyond the extent intended by Congress, and brushed aside the express limitations of the Patriot Act.

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

Prior courts have recognized the power of detention as incidental to waging war. This imputation of authority, as presented in *Hamdi*, was a narrow one. *Hamdi*, 542 U.S. at 518 (noting that Congress authorized the detention of Hamdi because it comported with "the limited category we are considering, for the duration of the particular conflict in which [he was] captured"). The logic of the Court relates fundamentally to the specifics of battlefield conduct necessitating the incarceration of combatants to prevent their return to arms. *Id.* at 581. As such, this Court determined those individuals captured on the battlefield were of such a nature that Congress in its authorization for war implicitly granted the President the power to detain them.

This determination did not touch on the authorization of detentions in other contexts. Moreover, the *Hamdi* decision reinforced the longstanding principle of the law of war that military detention is only appropriate to prevent a combatant captured in wartime from returning to battle. *Id.* at 518. Without more specific authorization, it would be inappropriate

to interpret the AUMF to permit the military detention of domestic civilians.

Relying on the decision in *Hamdi*, the fourth circuit in *Padilla* found that the detention of a party who was armed and present in a combat zone, though captured in the United States, was authorized under the AUMF. *Padilla*, 423 F.3d at 392. In that case, an American citizen was detained in the United States after being accused of having taken up arms against the United States and entering the United States to further a violent military objective. *Id.* at 390. Taking the allegations as true demonstrated that Padilla had crossed the threshold into belligerency by taking up arms; thus, he could legitimately fall into the category of "enemy combatant." *Id.*

The Government and the plurality below seem to interpret the conclusion in *Hamdi* and the logic in *Padilla* to indicate that the AUMF sanctions the detention of civilians accused only of al Qaeda affiliation. Reading into the narrow circumstances considered by the Courts in *Hamdi* and *Padilla* commands a contrary conclusion. The narrow question in *Hamdi* referred to the permissibility of detaining "an individual who ... was part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there. *Padilla*, 423 F. 3d at 392, (citing *Hamdi*). Because the *Hamdi* Court's understanding of the

Congressional authorization is grounded in the law of war, without further authorization from Congress, categorization of enemy combatants must respect the laws of war. *Hamdi*, 542 U.S. at 594.

When Congress enacted the AUMF, the law of war did not contemplate the military detention of non-combatants. It is inconceivable that a court may imply from Congressional silence on that very issue that it intended to authorize a practice that was unknown to the law of war. The Twelfth Circuit's reasoning, which determined that military detention of civilians is permissible even if they have not directly participated in hostilities, did just that. Its determination expanded the meaning of the AUMF to grant sweeping, and unsupported, domestic powers to the President.

The Court correctly noted that the powers addressed in the Patriot Act are distinct from the war powers described in the AUMF. They failed to address, however, the fact that Congress spoke explicitly to the detention of domestic terror suspects in the Patriot Act. See *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") at §412. Congress, by acting explicitly on the very type of suspect present in this case, overtly restricted its previous grant of authority in the AUMF not to apply to this

circumstance. Rather, Congress intended that type of suspect to fall outside of the scope of military detention authorized under the AUMF. See *Petition for Writ of Certiorari, Al-Marri v. Pucciarelli*, 534 F. 3d 213 (2008) (No. 08-368). (“It defied belief that Congress, mere days after the September 11 attacks, would expend precious legislative time and energy authorizing domestic detention of alien terrorist suspects if it had already done so *sub silentio* in the AUMF.”)

For the foregoing reasons, it is illogical to conclude that Congress, in its hasty drafting of a document authorizing the President to go to war, also meant to implicate the rights of legal residents across the United States.

C. The President Lacks Inherent Constitutional Authority to Detain a Civilian Legally Residing in the United States

The plurality below did not thoroughly consider the President’s inherent constitutional authority because it read the AUMF to provide clear authorization for Ahmed’s detention. However, the text of the AUMF is not unquestionably clear on the detention of suspects in Ahmed’s situation. It is therefore appropriate for this Court to review the Government’s argument that the President has inherent powers to detain persons without Congressional authorization.

The government’s assertion that the President’s inherent war powers include the authority to order the military detention of residents legally in the United States stretches the framework

set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), too far. To sustain that argument would give the Executive nearly limitless power in wartime to detain – on a bare accusation of membership in an organization and intent to commit an act – any individual within the United States. The framers of the Constitution and the Justices in *Youngstown* would have seen this conclusion as an illogical and impermissible result.

Youngstown envisioned a spectrum of Presidential power in war and peacetime to determine the strength of presidential authority. The President's authority is at its apex when he "acts pursuant to an express or implied authorization of Congress," and is lowest when the President "takes measures incompatible with the expressed or implied will of Congress..." See *Youngstown*, 343 U.S. at 635. In between the extremes is the "zone of twilight" where Congress has remained silent on an issue and the President can rely upon his own independent powers. *Id.* at 637.

In the AUMF Congress has not explicitly spoken on the issue of detention of domestic civilians. Because Congress did explicitly address the issue in the Patriot Act, it is apparent Congress intended to exclude the type of action that the President has taken here. Patriot Act at §412; see also *Al Marri v. Pucciarelli*, 534 F. 3d 213, 249 (Motz, J., concurring in the

judgment) ("Congress has carefully proscribed the process by which it wishes to permit detention of "terrorist aliens" within the United States, and it has expressly prohibited the indefinite detention the President seeks here.") To treat domestic terror suspects any differently than the detention framework set out in the Patriot Act demands in section 412, would directly contradict the clear intent of Congress.

Where, as here, the President acts in the face of Congressional disapproval, he is at his weakest. "Whether or not the President has independent power... he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Hamdan v. Rumsfeld*, 548 U.S. 547 n. 23 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). The petitioners in *Padilla* and *Hamdi* did not fall under the domestic protections of the Patriot Act; Ahmed does. No court has ever determined that the President could defy Congress, depending solely upon his own constitutional authority, in detaining any "enemy combatant" in the war on terror. *Al Marri v. Puccarelli*, 534 F. 3d 213, 250 (2008) (Mozt, J., concurring) ("The President's constitutional powers do not allow him to order the military to seize and detain indefinitely [the petitioner] without criminal process any more than they permit the President to order the military to seize and detain, without criminal process, other terrorists within the United

States, like the Unabomber or the perpetrators of the Oklahoma City bombing.") Where Congress has attempted to limit the President's authority, "Presidential claim[s]" to power "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638, 72 S.Ct. 863 (Jackson, J., concurring). To sustain the President's claim of inherent authority to detain Ahmed would improperly vest uncontrollable power in one branch of the government and strip the Courts and Congress of meaningful checks upon the power of the President to wage war at home and abroad.

D. Ahmed's Detainment is Contrary to the Principle of Distinction and the Law of War Generally

Neither the Government nor any Court has presented a clear and consistent definition of who may be reasonably considered an enemy combatant for the purposes of military detention. *Khalid v. Bush*, 355 F. Supp. 2d 311, n. 2 (2004)(describing the debate over the scope of the term "enemy combatant", concluding the definition to be "[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." See Deputy Secretary of Defense Paul Wolfowitz, Memorandum for the Secretary of the Navy, *Order*

Establishing Combatant Status Review Tribunal (July 7, 2004)); see also *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (Where the court considered the "various iterations of the definition drafted by the Executive and/or Congress over the past four years.").

Especially given this domestic legal ambiguity, the law of war is an essential tool for the analysis of the treatment and detention of individuals in wartime. The law of war is the only form of law equipped to deal with the exigencies of war: targeting, killing, and detention. At the same time the law of war seeks to form barriers in the means and methods of warfare to protect civilians, limit the scope of destruction, and protect the treatment of belligerents in *hors de combat*.

The distinction between combatants and civilians animates every provision of the law of war. See *Quirin*, 317 US at 31 ("By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations..." Combatants as defined in the Geneva Convention may be targeted by enemy forces but are also subject to military detention and justice. Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364. Civilians, on the contrary, may not legally engage in hostilities, but enjoy protections under the law of war against

explicit targeting and are subject to civilian legal proceedings. See Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 41 Texas Int'l L. J. 1 at 9.

Under the law of war direct participation in hostilities dictates when civilians may be treated as combatants for the purposes of targeting and detention. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Int'l Armed Conflicts art. 50, June 8, 1977, 1125 U.N.T.S. 3 [Additional Protocol I]. Though the U.S. is not a party to the first Additional Protocol, it is widely accepted that this protocol is binding as part of the United States' obligations under customary international law. See, e.g., Henckaerts, "Study on Customary International Humanitarian Law," 87 *Int'l Rev. Red Cross* 857 (March 2005). Direct participation involves individuals who engage in military operations that inflict a threshold level of harm and are specifically designed to directly cause that harm. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009). This limitation maintains the broad norm that the scope of warfare should be limited and domestic procedures should be utilized where possible and appropriate.

The Twelfth Circuit disregarded this important distinction when coming to the apparently automatic result that Congress in

the AUMF "clearly meant to include members of al Qaeda" in authorizing the use of force. That determination is anything but clear. Respondents have not alleged that Ahmed at any point engaged in behavior intended to harm the United States with any immediacy. Unlike in *Padilla*, where the Court found that the individual was "armed and present in a combat zone during armed conflict", Ahmed never engaged in hostilities in a battlefield. *Padilla* at . Up to and until such time that an alleged "member" engages in belligerent activities in a combat zone they maintain their civilian status and under *Milligan*, the law of war, and the Constitution, cannot be designated otherwise.

The Courts in *Milligan*, *Quirin* and *Hamdi* established definitions of combatants that conformed to the longstanding distinction between civilians and combatants. The government and the majority below misinterpreted the scope of presidential authority in applying those precedents to the current case.

The Government relies heavily on *ex parte Quirin* in an attempt to analogize the prosecution of war criminals in a military tribunal to the indefinite detention of civilians lawfully in the United States. As discussed above, the formal affiliation of the *Quirin* detainees with an enemy state's military arm qualified them as enemy combatants subject to detention and military justice for violations of the laws of war. *Quirin*, 317 U.S. at 31. Members of state armed forces who

behave in violation of the laws of war, such as by engaging in espionage, are "unlawful" combatants subject to trial by a military court. *Id.* At no point did the *Quirin* detainees qualify for civilian status because they clearly and openly identified with the enemy and violated a law of war. *Id.*

Ahmed continues to assert his civilian status, and the government has not accused him of committing a war crime. See *Hamdan v. Rumsfeld*, 548 U.S. at 601 (Kennedy, J., concurring) (explaining that conspiracy is not a violation of customary or statutory laws of war). According to the allegations of the government, taken as true, Ahmed is a civilian under the definition of a combatant previously established by U.S. courts and the law of war. Given the clarity of existing law on this issue, this Court cannot conclude that Ahmed may be treated as a combatant in the war on terror.

E. The President Does Not Have the Power Under the AUMF to Detain Ahmed Because it is Neither Necessary Nor Appropriate

In coming to its conclusion that Ahmed was subject to detention under the AUMF, the Twelfth Circuit ignored the clear intent of Congress that the President engage in the use of force only when both "necessary" and "appropriate". AUMF.

1. Such Action is Never Appropriate for Domestic non-Combatant Terror Suspects

The Twelfth Circuit is correct that both *Hamdi* and *Padilla* establish that the President is authorized under the AUMF to

detain enemy combatants who have taken up arms against the United States in support of an enemy. *Hamdi*, 542 U.S. at 518; *Padilla*, 423 F.3d at 390. However it is unclear how the lower court expanded the scope of precedent to include individuals who have not explicitly taken up arms against the United States. Their conclusion commands that mere alleged affiliation with al Qaeda would be sufficient to qualify any civilian individual residing in the United States as an enemy combatant. Taken to its logical conclusion, this determination of the court poses a severe threat to the liberty interests of any legal resident of our country.

The court below was concerned by the implication that a contrary holding would deny the President the power to detain indefinitely as unlawful combatants individuals similarly situated to the very terrorists who carried out the 9-11 attacks. However, this does not imply that federal authorities would be powerless act. Even if this wartime detention power does not exist, the civilian criminal justice procedures are still in full force. Officials may arrest, detain for a limited period, question extensively, charge and imprison individuals guilty of criminal conspiracy. Past experience shows that the civilian criminal justice system is eminently capable of processing and imprisoning even the most heinous criminals. The Government's implication that the Department of Justice is

inadequate to the task of handling accused criminals like Ahmed, deeply wounds the legitimacy of the United States, at home and abroad, as a nation that upholds the rule of law above all else.

The law of war was envisioned not to create an extra-legal framework, where laws simply did not apply, but instead was conceived by nations cognizant of the tragedies and necessities of war. Where our domestic law is sufficient and an individual has not engaged in combat activities, the rule of law commands that they be treated as civilian criminals.

In *Hamdi*, the Court held that where an individual was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and . . . 'engaged in armed conflict against the United States' there," he could be legally detained under the AUMF. *Hamdi*, 542 U.S. at 519. The Court repeatedly emphasized that its decision was narrowly applicable only to individuals whose circumstances were similar to Hamdi's. *Id.* The purpose of Hamdi's detention was not to punish but rather to prevent him from returning to battle during the duration of hostilities – an uncontroversial power recognized and limited by the laws of war. *Id.* at 518.

The Bush administration, in explaining the logic behind the use of the term "enemy combatant," shows similar reasoning as to why they come up with this categorization. Wartime operations require urgent decisions to be made in the field of battle. See

Memorandum to Members of the ASIL-CFR Roundtable from William J. Haynes II, General Counsel for the Department of Defense regarding Enemy Combatants (2002).

Ahmed was captured as a civilian within the borders of the United States and civilian authorities were fully capable of using traditional methods to prosecute him. In fact, he was less than one month from trial in Federal District Court in East Dakota when the President ordered him transferred into military custody. Additionally his status as a "sleeper" agent with no immediate intention to engage in hostilities reduced the urgency of the threat of battle. Therefore his indefinite detention was neither necessary nor appropriate.

2. Even if Sometimes Appropriate, Military Detention is Not Appropriate for Ahmed Based on the Circumstances of This Case

The government argues that the president must have the power to detain Ahmed because of the classified nature of information relevant to certain terrorist suspects similarly situated to Ahmed. The circumstances of this case do not support the President's assertion of Executive prerogative.

Here Ahmed was successfully detained by domestic authorities. In addition, criminal procedures in place allowed for civilian prosecutors to charge him with a crime. Finally, based on the allegations, Ahmed was not an *immediate* threat to the security of the United States. Thus, based on the specific

facts of this case, Ahmed's detention was neither 'necessary' nor 'appropriate' as an incidence to the use of force in war.

For the foregoing reasons, the Twelfth Circuit's decision that the President had the authority to detain Ahmed under the AUMF was in error and its decision should be REVERSED.

II. The Procedures Afforded to Ahmed in the District Court to Challenge the Factual Basis of his Enemy Combatant Status Were Constitutionally Insufficient

"'In our society liberty is the norm,' and detention without trial 'is the carefully limited exception.' *Hamdi*, 542 U.S. 507 (2004) (quoting *Salerno*, 481 U.S. at 755). The Petitioner in this case has invoked the writ of habeas corpus to seek judicial review of his detention. Except in the rarest circumstances, when Congress determines with clarity that it must suspend the writ, the writ of habeas corpus is a critical check on unlimited Executive authority. *Hamdi*, 542 U.S. at 530 (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)); See U.S. Const. art. 1, § 9, cl. 2; see also 28 U.S.C. § 2241 et seq. Unless Congress has explicitly suspended the writ, Courts have significant discretion to tailor the procedures to adjudicate the petition of a given prisoner. See *Hamdi*, 542 U.S. at 526. In all cases, though, the chosen procedure must comport with due process. *Id.*

As the Court of Appeals for the Twelfth Circuit correctly concluded, the District Court's reliance upon hearsay evidence, acceptance of the burden-shifting presumption against Ahmed, and failure to consider factual circumstances distinguishing Ahmed's case from *Hamdi* when it applied the *Mathews* balancing test, violated Ahmed's constitutional right to due process under the Fifth Amendment.

A. Ahmed is entitled to greater procedural protections than Hamdi because the circumstances of his capture alter the respective weight of each party's interests

Courts determine procedural due process rights by weighing the interests of the government against the interests of the person or persons whose rights are at stake. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The process due to an individual under the Constitution depends heavily on the facts peculiar to each case. Different factual circumstances may significantly change the weight of each interest in the *Mathews* balancing analysis. In this case, Ahmed faces the deprivation of the "the most elemental of liberty interests – the interest in being free from physical detention by one's own government." *Hamdi*, 542 U.S. at 529; *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that "all persons within the territory of the United States are entitled to the protection guaranteed by" the Due Process clause of the Fifth Amendment). In a society that cherishes liberty above all other interests, the Judiciary functions as the fundamental backstop to ensure that individuals

are detained only in accordance with law. *See Hamdi*, 542 U.S. at 525.

In *Mathews*, this Court ruled that lower courts can discover the procedural requirements of due process in individual cases by balancing private interests against the Government's asserted interests, including the burden upon the Government of providing heightened procedural safeguards to petitioners. *Mathews*, 424 U.S. at 335. Courts balance these interests through an analysis of "the risk of an erroneous deprivation" of the private interest and the "probable value, if any, of additional or substitute procedural safeguards." *Id.*

Ahmed's interest in physical freedom from indefinite detention is the strongest of all possible private liberty interests. *See Hamdi*, 542 U.S. at 529 (quoting *Foucha v. Louisiana*, 504 U.S. 71 , 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.")).

The exigencies of war do not diminish the vitality of the Constitution or the individual liberties that it guards. *See U.S. v. Robel*, 389 U.S. 258 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile"). Rather, "as critical as the Government's interest may be in detaining those who actually

pose an immediate threat to the national security of the United States during ongoing international conflict, 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 (citing *Ex Parte Milligan*, 4 Wall., at 125).

Procedures that are constitutionally sound in one case may be patently insufficient in a case with different factual circumstances. The District Court in this case misapplied the framework from this Court's decision in *Hamdi* when it determined that Ahmed was not entitled to greater process than Hamdi to prevent the erroneous deprivation of his physical liberty. Specifically, as the Twelfth Circuit Court of Appeals correctly determined, the District Court did not give sufficient weight to the facts in this case that distinguish it from *Hamdi*. The peculiar factors that warranted relaxation of procedural safeguards in the *Hamdi* case are absent in this case.

The dissent below sought to undermine the significance of the distinguishing facts in this case. Those facts, though, are critical because they alter the result of the *Mathews* balancing test. The procedures used in the District Court in this case posed an "unacceptably high" risk that Ahmed was erroneously deprived of his liberty. This Court should AFFIRM the judgment of the plurality below on the issue of due process, and instruct

the District Court to reconsider Ahmed's challenge in accordance with the Constitution.

1. Place of Capture

Ahmed was arrested by civilian authorities in the United States, charged with crimes in the United States, and held as a civilian for 18 months before he was transferred into military custody. Hamdi was arrested by allies of the American military while bearing arms on an active battlefield in Afghanistan. There is no dispute that the reach of the civilian criminal jurisdiction of the United States did not extend to the battlefield where Hamdi was captured. However, there is also no dispute that Ahmed was arrested, and continues to be held, in a place in which American federal criminal jurisdiction was in full effect.

The outer limits of reasonable extraterritorial application of criminal law have generated much debate and controversy. However, it has never been controversial to state that the civilian criminal authorities of a sovereign state may apply that state's criminal law against persons detained within the territory. See Restatement (Third) of Foreign Relations Law § 432 (1987). The burdens of presenting non-hearsay evidence in Ahmed's case are significantly lower than the burdens the Executive faced in *Hamdi*. See *Hamdi*, 542 U.S. at 533.

2. Circumstances of Capture

Ahmed, unlike Hamdi, was not captured while actively engaged in military confrontation with American forces or allies on a battlefield. This Court recognized that the circumstances of Hamdi's capture, while armed in combat in Afghanistan against allies of the United States, severely undermined the risk of erroneous deprivation that animates the *Mathews* test. Indeed, it may be reasonable to provide fewer procedural protections to a person captured "red-handed" in a warzone because the risk that the President's determination is wrong is low. See *Hamdi*, 542 U.S. at 533-34.

Ahmed's case is at the opposite end of the spectrum in this respect: Ahmed entered the U.S. on a valid student visa granted by the government and was arrested in East Dakota by Federal law enforcement agents. Ahmed was unarmed at the time of his arrest and did not resist. As the Twelfth Circuit plurality properly concluded, "[t]here is a much greater risk of misidentifying a civilian as an enemy combatant in this context." *Ahmed v. U.S.*, No. 06-9701, at 27 (12th Cir. 2008), *cert granted*, (U.S. Oct. 2, 2009)(No. 08-11144).

Nothing in this case distinguishes the circumstances of Ahmed's capture from the arrest of any other suspected criminal in the United States. The extraordinary thing, here, is the assertion that the Government may remove him from the normal

criminal process and hold him on nothing more than the Executive's unsubstantiated whim.

3. Location and Availability of Witnesses

In *Hamdi*, the Court recognized the burden on the Executive of requiring active-duty military personnel deployed in distant theaters of war to testify in his challenge proceedings. *Hamdi*, 542 U.S. at 530. Combined with the weighty interest of the Government in ensuring national security, this Court reasoned that requiring the Government to present such witnesses would be unduly burdensome and not significantly impact the accuracy of the challenge proceeding's outcome. *Id.*

In this case, civilian officers who reside in the United States were involved in investigating Ahmed for the purpose of developing evidence for use in a civilian criminal trial. It is common for law enforcement agents to testify in criminal trials. For that purpose, agents receive specific training in collection of evidence, interrogation techniques, and how to testify in courts. The incremental cost of summoning the officers involved in the government's investigation of Ahmed in this habeas corpus proceeding is insignificant when compared to the weight of Ahmed's liberty interest.

In addition, allowing Ahmed to confront material witnesses against him would not jeopardize the Executive's ability to wage war, which this Court was wary to encroach upon in *Hamdi*. There, summoning active duty personnel away from combat and command

would have been heavily burdensome to the war effort. However, no such burden exists in this case.

Even if the Government has a compelling interest in withholding the identity of witnesses or substance of secret evidence against Ahmed, the cost of allowing Ahmed to confront and rebut the evidence gathered against him for use in his civilian criminal trial is minimal. In comparison, allowing Ahmed to see and rebut that evidence with specificity would significantly reduce the risk of erroneous deprivation of his liberty. The availability of witnesses, and the fact that requiring them to testify would not burden the President's ability to wage war overseas, strongly weigh in favor of additional process for *Ahmed* to prevent the erroneous deprivation of his liberty.

4. Location and Availability of Evidence

The evidence in *Hamdi* had been "buried under the rubble of war" in a distant land, but that is not true in this case. *Hamdi*, 542 U.S. at 532. The Twelfth Circuit correctly concluded that the District Court erred when it failed to require the government to present available non-hearsay evidence in support of its allegations in the Murphy Declaration.

In this case, Ahmed was held for nearly 18 months pending a civilian criminal trial on charges of Social Security fraud and lying to the FBI. The Government could not maintain a case against Ahmed in civilian criminal court without admissible

evidence. However, Ahmed did not have access to the Government's evidence against him, even that which concerned the charges for which he was first arrested and held by civilian authorities.

The Murphy Declaration asserted that the Government recovered information from Ahmed's computer that proves criminal culpability and supports his detention as an enemy combatant. Yet no court has provided Ahmed with access to the Government's investigation, and he has had no meaningful opportunity to challenge its findings. The assertion of the dissenting judges below, that the problem in this case is Ahmed's failure to assert more than a blanket denial in response to the Government's allegations, is unfair on its face. Ahmed has been denied access to information that might enable him to meaningfully and fairly challenge the Government's accusations.

In addition, the timing of the Government's motion to dismiss the criminal indictment against Ahmed and transfer him into military custody is highly suspect. The motion came just three days before a scheduled pretrial hearing – and just weeks before his trial was to begin – at which Ahmed would have sought to challenge evidence that he alleged had been obtained by torture. For more than three centuries, Anglo-American jurisprudence has rejected “trial by rack” and the use of evidence obtained by torture because its credibility is doubtful. 4 William Blackstone, *Commentaries on the Laws of*

England, at 320 (stating that such practices, after 1640, were “utterly unknown to the law of England.”); see also *Ashcraft v. State of Tennessee*, 322 U.S. 143, 155 (1944) (“There have been, and are now, certain foreign nations that . . . convict individuals with testimony . . . [wrung] from them . . . by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.”)

The rules of evidence exist to provide civilian defendants like Ahmed with fair process. By transferring Ahmed to military custody, the Government avoided the potential embarrassment of admitting the practices it employed during Ahmed’s detention because it could not make a case against Ahmed with admissible evidence. For this Court to sustain the procedures afforded to Ahmed to challenge his military detention would place all criminal defendants awaiting trial in U.S. civilian courts in jeopardy of indefinite military detention if the Executive, in its sole discretion, decided it was necessary. No statutory or inherent power is broad enough to encompass this sweeping detention power.

PRAYER FOR RELIEF

For the above reasons, the decision of the Court of Appeals with respect to the President's authority to detain Ahmed should be **REVERSED**, with instructions to transfer Ahmed to the custody of the Department of Justice for trial or order him released. In the alternative, the judgment of the Court of Appeals with respect to Ahmed's challenge proceedings in the District Court should be **AFFIRMED**, and the case should be remanded to the District Court for further proceedings consistent with the requirements of the Constitution.

Respectfully submitted,

Team 3489

Counsel for Petitioner
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