

No. 08-11144

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

TEAM 3554
Counsel of Record

QUESTION 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 requirement of the Fifth Amendment.

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OPINION BELOW

The opinion of the court of appeals is reported at Docket No. 06-7901.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 24, 2008. The petition for a writ for certiorari was granted October 2, 2009.

STATUTORY PROVISION INVOLVED

The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF") is set forth at Record 2-3.

STATEMENT

On September 8, 2001, Burdan Uddin Ahmed, a citizen of Pakistan, lawfully entered the United States with his family to pursue a Doctor of Veterinary Medicine degree at Wilson University in Wilson, North Dakota. In early 2002, Mr. Ahmed was arrested, charged in the District of East Dakota with the possession of counterfeit Social Security cards with the intent to defraud, was charged with making false statements to the FBI, and plead not guilty to all counts.

In June 2003, the government filed an ex parte motion to dismiss the indictment based on a Presidential order determining that Mr. Ahmed was an enemy combatant and stating Mr. Ahmed's detention by the military was necessary to prevent him from aiding al-Qaeda and ordered his detainment as an enemy combatant.

The District court granted the motion to dismiss the criminal charges and Mr. Ahmed was transferred to military custody at the Army Regional Consolidated Detention Facility in Souds, East Dakota. Mr. Ahmed was held militarily as an enemy combatant without charge or trial and was given no indication when his detention would end.

Following his transfer to military custody, Mr. Ahmed filed for writ of habeas corpus to secure his release from military detention. The Government provided the court with a hearsay document, the Declaration of John R. Murphy (the "Murphy Declaration"), allegedly detailing Mr. Ahmed's involvement with al Qaeda. The district court agreed Mr. Ahmed could be detained as an enemy combatant but, finding he was entitled to challenge the factual basis of his detention at a hearing, sent the case to a magistrate judge to determine the process afforded.

The Magistrate judge determined that the government must provide Mr. Ahmed with notice of the factual basis of his detention and, if the government could produce credible evidence

supporting his designation as an enemy combatant, the burden would shift to Mr. Ahmed to refute his designation with more persuasive evidence. If Mr. Ahmed could produce such evidence, the government must either release him or agree to a full adversarial hearing with more robust procedural guidelines. *Id.* The Magistrate judge decided the Murphy declaration provided adequate notice of the factual basis for his detention and allowed sixty days to present rebuttal evidence.

Mr. Ahmed asserted he was not an enemy combatant and refused to offer any evidence to rebut the Murphy Declaration, asserting that the procedures adopted were unconstitutional and should not be forced to prove his own innocents. The Magistrate recommended that the petition for habeas corpus be dismissed. Mr. Ahmed appealed. Now, nearly eight years later, Mr. Ahmed remains in military custody with no date established for his trial or the end of his detention.

SUMMARY OF ARGUMENT

The President does not have the power under the Constitution to indefinitely detain Mr. Ahmed militarily as an enemy combatant. The plurality applied incorrect case precedent to the specific facts of Mr. Ahmed's case, which allowed military detention, denying Mr. Ahmed's due process right of criminal jurisdiction.

The President is not authorized to indefinitely detain lawful residents of the United States. Criminal terrorist conduct by an alien *in this country* is afforded civilian jurisdiction, not indefinite military detention as an enemy combatant.

Even assuming the president can indefinitely detain enemy combatants, Mr. Ahmed does not qualify as an enemy combatant and thus is not subject to indefinite military detainment. The specific facts of Mr. Ahmed's case dictate he is a civilian under the traditional law of war.

The President does not have inherent Constitutional power to detain Mr. Ahmed indefinitely under the Necessary and Proper Clause. There is no specific language of detainment needed under the statute under which Mr. Ahmed has been held. Further, other statutes dictate "terrorist aliens" legally within the U.S. are subject to limited detainment and criminal process.

The actions taken in the past and during the term of President Obama has taken indicate the criminal justice system is adequate for prosecuting suspected terrorists.

As the Twelfth Circuit found, Mr. Ahmed was not afforded sufficient due process to challenge his classification as an "enemy combatant". If Mr. Ahmed is to be charged for any crimes, the criminal justice process should be used. The right to due process guaranteed by the Fifth Amendment does not discriminate based on citizenship status. As a legal resident of East Dakota, Mr. Ahmed is entitled to the same protections enjoyed by the citizens of the United States, including the right to challenge detention by the government in a habeas corpus proceeding.

The district court erred in rigidly applying the *Hamdi* burden-shifting framework to Mr. Ahmed. The *Hamdi* court acknowledged that the framework was to be used as a guideline and not a rigid protocol. The "exigent circumstances" in *Hamdi* permitting exceptions to due process simply do not exist in this case. Mr. Ahmed was not seized and detained while a soldier on the battlefield in Afghanistan like Hamdi; he was arrested at his home while a student at a university in East Dakota.

As part of the review of due process rights for detainees, *Hamdi* requires the balancing of the interests of the government and those of Mr. Ahmed. The Twelfth Circuit held that the lower court ignored the directive in *Hamdi* and did not give sufficient

attention to these competing interests. It confirmed that Mr. Ahmed's fundamental liberty interest and the attendant risk of its erroneous deprivation outweighed the government's national security interests.

The district court erred when it accepted the Murphy Declaration as the "most reliable evidence". The Murphy Declaration was a compilation of facts by a government employee concerning Mr. Ahmed's alleged involvement with al Qaeda; it was hearsay. The government made no showing that it was unable to produce non-hearsay evidence and did not meet the evidentiary standards required by the *Hamdi* court. The Twelfth Circuit acknowledged that the court failed to inquire whether other non-hearsay evidence was available.

Mr. Ahmed was not provided with a fair opportunity to rebut the charges filed against him. Mr. Ahmed did not refuse to avail himself of the process. He was never provided with any evidence by the government other than a hearsay document and no opportunity to confront his accusers. He was denied the fundamental rights accorded by the Due Process Clause of the Fifth Amendment.

The holding of the Twelfth Circuit that Mr. Ahmed was not afforded sufficient due process should be affirmed by the Court.

ARGUMENT

I. THE COURT BELOW UNCONSTITUTIONALLY HELD THE PRESIDENT HAS THE POWER UNDER THE AUMF TO INDEFINITELY DETAIN MR. AHMED MILITARILY AS AN ENEMY COMBATANT.

The traditional period of indefinite detention during armed conflict between nations is not found in this "war on terror" because as President Bush stated, "The war on terror we fight today is a generational struggle that will continue long after you and I have turned our duties over to others." Pres. George W. Bush, State of the Union Address (Jan. 23, 2007). Thus inquiries regarding indefinite detention by the Executive deserve careful scrutiny. As Justice Scalia has written, "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-55 (2004).

Contrary to this fundamental principle, the government and the plurality opinion assert the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), grants the President the authority to indefinitely detain Mr. Ahmed as an "enemy combatant." Record 7. However, the plurality misinterpreted the relevant case law, Presidential powers under the Constitution, and the current Administration's agenda.

A. The President lacks the power to detain Mr. Ahmed militarily as an enemy combatant under the AUMF.

Mr. Ahmed is a lawful resident of the U.S., has civilian status, and is not associated with the military arm of a nation or organization at war with the U.S. and is thus not subject to indefinite military detention under the AUMF.

1. The AUMF does not grant the President authority to detain Mr. Ahmed indefinitely as an enemy combatant because it conflicts with precedent.

Under the AUMF, the President is authorized to use "all necessary and appropriate force against those... organizations... he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 115 Stat. at 224. Two cases, *Ex parte Quirin*, 317 U.S. 1 (1942), and *Ex parte Milligan*, 71 U.S. 2 (1866), have been used as precedent to determine the power granted by Congress to the President under the AUMF.

In *Quirin*, the court explained that "citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of ... the law of war." 317 U.S. at 37-38. Both *Hamdi* and *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), follow *Quirin's* reasoning

establishing authority under the AUMF for indefinite military detention of a detainee associated with the "military arm of the enemy government." *Quirin*, 317 U.S. at 37-38; *Hamdi*, 542 U.S. at 519; *Padilla*, 423 F.3d at 391. These cases can be distinguished from *Milligan*, where the detainee conspired to overthrow the U.S. government, but was not associated with the army of an enemy nation. *Milligan*, 71 U.S. at 45. He was considered neither an enemy combatant nor a military detainee, but rather a civilian subject to criminal trial. *Id.*

The lower court's decision incorrectly held that Mr. Ahmed falls into the *Hamdi* interpretation of the Presidential powers. Record 11. Mr. Ahmed is not "'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." *Hamdi*, 542 U.S. at 516. Indeed the *Hamdi* court held that since "capturing and detaining enemy combatants is an inherent part of warfare," "the 'necessary and appropriate force' referenced ... includes the capture and detention of ... hostile forces arrayed against our troops." *Id.* at 515. The purpose of detention is to prevent those captured from "returning to the field of battle and taking up arms once again." *Id.* at 518.

Unlike *Hamdi* and *Padilla*, Mr. Ahmed was not bearing arms on the battlefield in Afghanistan and was not fighting for Taliban

government forces. The rationale in those cases, namely assuring the combatant does not return to the field of battle to once again take up arms against the United States, does not apply in Mr. Ahmed's case.

Mr. Ahmed is a citizen of Pakistan, a country with diplomatic relations and not one at war with the United States. Record 47, ¶¶ 5, 8. While at his home, his legal residence, in the United States, he was arrested and subjected to criminal prosecution before President Bush "determined" he was an enemy combatant and transferred to a military facility held indefinitely without charge or trial. Record 7-8. Mr. Ahmed was not seized on a battlefield of which the U.S. is engaged in combat. *Cf.* Record 47-48.

The circumstances in this case are more similar to those in *Milligan*, where this Court held that those "joining and aiding" a "secret political organization" and "seeking by stealthy means to introduce enemies of the country to peaceful communities" to overthrow the U.S. government are "dangerous enemies" to the United States. *Milligan*, 71 U.S. at 130. *Milligan*, an American citizen who was detained after conspiring to overthrow the United States government, was subject to criminal prosecution and trial because he was neither "a resident of one of the rebellious states" of the Confederacy "[n]or a prisoner of war, but a citizen of Indiana ... [who was] never in the military or

naval service." *Id.* at 118 (emphasis added). A trial before a military commission would constitute a violation of his constitutional rights. *Id.* at 122-25. In its decision, *Quirin* noted that *Milligan* stands for the proposition that a person may not be subjected to military detention if the person is "not ... a part of or associated with the armed forces of the enemy," *Quirin*, 317 U.S. at 37-38, and emphasizes our Constitution does not permit the Government to subject civilians within the U.S. to indefinite military detainment and jurisdiction. *Id.* at 45.

Most significant for this case, *Hamdi* noted that the holding in *Milligan* "turned in large part on the fact that Milligan was not a prisoner of war" (i.e. was not a combatant) and suggested that "had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522. Similarly, Mr. Ahmed was not captured in a battlefield carrying a rifle but within the confines of his own legal residence.

2. The AUMF does not authorize the President to indefinitely detain lawful residents of the United States.

The Supreme Court has repeatedly held that aliens like Mr. Ahmed have due process protection. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006); *Zadvydas v. Davis*, 533 U.S. 768, 693

(2001); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

Criminal terrorist conduct by an alien in this country is afforded civilian jurisdiction, not indefinite military detention as an enemy combatant. See e.g. *United States v. Goba*, 240 F.Supp.2d 242,244 (W.D.N.Y.2003) (civilian prosecution of associates of al Qaeda, including those who met with Bin Laden and trained in terrorist camps in Afghanistan); *United States v. Abdi*, 463 F.3d 547, 550 (6th Cir. 2006); *United States v. Moussaoui*, 382 F.3d 453, 454 (4th Cir. 2004); *United States v. Reid*, 369 F.3d 619, 619-20 (1st Cir. 2004). Indeed, even after asserting Padilla was an enemy combatant, the Government ultimately prosecuted him in civilian court for his crimes. Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*. Nov.23, 2005, available at <http://www.nytimes.com/2005/11/23/national/nationalspecial3/23terror.html>.

3. Mr. Ahmed does not qualify as an enemy combatant and is not subject to indefinite military detainment.

The Supreme Court has recognized that, under the Due Process Clause, it "may freely be conceded" that 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 (1987). However, the *Hamdi* Court recognized that Congress may constitutionally authorize the Executive to order

the military detention, not criminal prosecution, of those who "qualify as 'enemy combatants,' " who, fit in that particular "legal category" as one of a limited number of exceptions to the general rule. *Hamdi*, 542 U.S. at 516. It found the AUMF only authorized military detention of an enemy combatant as defined by the traditional law of war, and only then can the court accord with the "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 "enemy combatant" status is determined by an individual's connection with the "military arm of the enemy government." *Quirin*, 317 U.S. at 37-38. A civilian is someone in a certain legal category not subject to military seizure. *Hamdi*, 542 U.S. at 522, n. 1.

Only "persons who receive and execute orders" from the enemy's "command structure" can be considered members of the enemy's armed forces, and thus can be considered a combatant. The Court in *Gherebi v. Obama*, 609 F.Supp.2d 43 (D.D.C. 2009), found that "sympathizers, propagandists, and financiers who have no involvement with this 'command structure,' cannot be considered part of the enemy's 'armed forces' and therefore cannot be detained militarily unless they take a direct part in the hostilities." *Id.* at 68-69.

The *Gherebi* court held the President can detain *combatants* who are "persons who ...substantially supported... al-Qaeda forces... that

are engaged in hostilities against the United States..." *Id.* at 53. "Substantially supported" and "part of" are interpreted "to encompass only individuals who were members of the enemy organization's armed forces, as that term is intended under the laws of war, at *the time of their capture.*" *Id.* at 71. (emphasis added).

In the instant case, at *the time of his capture*, Mr. Ahmed was a legal resident attending veterinary school at Wilson University in Wilson, East Dakota. Record 47, ¶8. The only alleged illegal act alleged in the Murphy Declaration is the possession of a handwritten list of names and social security numbers allegedly to be sold and used to secure revenue for al-Qaeda. Record 48, ¶¶17,18. Alleged financiers are not considered to be substantially supporting the organization because they are not members of its armed forces. *See Gherebi*, 609 F.Supp.2d at 68-69. An individual who is not, in fact, substantially supporting the organization and is not part of the direct combat hostilities, cannot be considered a "combatant" and is considered a "civilian." Accordingly, Mr. Ahmed is a citizen who is not subject to indefinite military detention without any formal criminal charges or trial. Denial of liberty during times of conflict should be critically scrutinized, especially when termination of such hostilities is unknown.

B. The President does not have inherent Constitutional power to indefinitely detain Mr. Ahmed.

This Court has never approved the military detention of individuals lawfully residing in the U.S. without legislative authorization. *Hamdi*, 542 U.S. at 521. The Presidential powers to detain lawful aliens captured within the United States must be evaluated upon their "disjunction or conjunction with those [powers] of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring). Particularly relevant to this case, the determinative test under the Necessary and Proper Clause of the Constitution, Cons. Art. VIII, § 18, may be summarized as "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb." *Id.* at 637.

The language of the AUMF does not include language of detainment. The legislative history suggests Congress did not intend to expand the definition of enemy combatant to include civilians or to authorize the military seizure and detention of civilians within the United States in the AUMF. The Senate Judiciary Committee Chair, Senator Specter, noted that "[t]he proposal to add 'in the United States' was rejected since it would give the President broad authority not just overseas, but also in the United States.") *Wartime Executive Power and the*

National Security Agency's Surveillance Authority: Hearings before the S. Comm. on the Judiciary, 109th Cong. 126 (2006). The debates reinforce the understanding that the AUMF authorized only the use of military force abroad, not within the United States. See, e.g., 147 Cong. Rec. 17,047 (2001) (statement of Sen. Biden) ("The resolution is directed only at using force abroad to combat acts of international terrorism.").

Furthermore, a few weeks later, Congress did explicitly authorize the President to arrest and detain "terrorist aliens" who allegedly come to the United States solely to commit acts of terrorism. 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"). The Patriot Act authorizes detention only for a limited time pending deportation or trial, accompanied by civilian law enforcement processes and careful congressional oversight for terrorist aliens. *Id.* at §412(a). This specific language in the Patriot Act and the failure of the AUMF to include detainment demonstrate that Congress neither impliedly nor expressly authorized the indefinite military detainment of a legal alien. Thus, the President's indefinite military detention of Mr. Ahmed was unconstitutional under the Necessary and Proper Clause.

C. The Criminal Justice System is Adequate for Prosecuting Suspected Terrorists.

On January 22 2009, President Obama issued three Executive Orders and a Presidential Memorandum requiring the development of policies for detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and terrorism; and to review the detention of Ali Saleh Kahlah al-Marri. Statement of Eric H. Holder Jr., Attorney General of the United States, Before the United States Senate Committee on the Judiciary (June 17, 2009), available at <http://www.justice.gov/ag/testimony/2009/ag-testimony-090617.html>).

In a similar case to the one at bar, al-Marri was allegedly sent by al-Qaeda to the U.S. to serve as a sleeper agent to facilitate terrorist activities, to explore disrupting the financial system by computer hacking, and to obtain social security numbers in order to facilitate financing terrorist operations. See *al-Marri v. Pucciarelli*, 534 F.3d 213,219-20 (4th Cir. 2008). After a review of his case and detainment, al-Marri was transferred from military detainment to federal custody, and was formally charged. See Holder. He ultimately pleaded guilty to conspiracy to provide material support to the al-Qaeda terrorist network. *Id.*

Trying accused terrorists in the federal courts has been a common and successful approach since the 1990's. *Id.*; See also, e.g., *United States v. Abdi*, 463 F.3d 547; *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004); *United States v. Reid*, 369 F.3d 619, 619-20 (1st Cir. 2004); *United States v. Goba*, 240 F.Supp.2d 242, 244 (W.D.N.Y.2003). In fact, more than thirty individuals charged with terrorism violations have been successfully prosecuted and/or sentenced in federal courts nationwide. See Holder.

The government's contentions that military custody is necessary for the safety of the nation are insufficient when it is clear the government has successfully prosecuted and held suspected terrorists under criminal jurisdiction.

In times where national security arguments are used to limit person liberty, scrutiny must be used to limit the abuse of Executive power. In Mr. Ahmed's case, the plurality incorrectly held Mr. Ahmed qualified for indefinite military detention under the AUMF.

II. THE DUE PROCESS AFFORDED BY THE DISTRICT COURT TO CHALLENGE MR. AHMED'S DESIGNATION AS AN "ENEMY COMBATANT" WAS NOT SUFFICIENT UNDER THE REQUIREMENTS OF THE FIFTH AMENDMENT.

A. Mr. Ahmed Is Entitled to Due Process

"The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens." *Joint Anti-fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). These are indeed times of trouble, times of "acts of treacherous violence" *Hamdi*, 542 U.S. at 510, when the rights of all may be imperiled if the rights of any are denied. This Constitutional protection does not turn on whether a person is a citizen or an alien legally residing in the United States; it extends to all those within the territory of the United States. *Wong Wing*, 163 U.S. at 238; *Zadvydas*, 533 U.S. at 693. Aliens may not be deprived of life, liberty or process without due process of law. *Wong Wing*, 163 U.S. at 238.

Mr. Ahmed, a legal resident of the United States, arrested in his home in the State of Illinois, is entitled to the due process guaranteed by the Fifth Amendment. "Freedom from imprisonment - from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that [Due Process] Clause protects. *Zadvydas*, 533 U.S. at 690. Although the Patriot Act authorized the President to detain non-

citizens ("terrorist aliens") living within the United States, it authorized detention for a limited time pending deportation or trial, accompanied by civilian law enforcement processes and careful congressional oversight. *Al-Marri*, 534 F.3d at 240. The record does not show the President detained Mr. Ahmed under this statute.

B. The District Court Misapplied *Hamdi* and Denied Mr. Ahmed Due Process

Assuming *arguendo* that this Court decides that Mr. Ahmed may be detained as an "enemy combatant", this Court has said that government detention violates the Due Process Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections. *Salerno*, 481 U.S. at 746 (1987). The government argues that Mr. Ahmed was given adequate process to challenge his detention.

In January 2002, almost four months after the terrorist attacks, Mr. Ahmed, a veterinary medicine student, was arrested by the FBI at his home in East Dakota and detained as a material witness in the investigation of the attacks. Record 7. However, after ten months had passed, he was finally charged with a crime - that of possessing counterfeit Social Security cards with the intent to defraud. Record 7. After a year had passed, he was further charged with making a false statement to the FBI. Record 7. The federal government has created a "well-stocked statutory

arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorism might commit. *Hamdi*, 542 U.S. at 547 (2004)(Souter, J. concurring in part, dissenting in part, and concurring in the judgment) (citing statutes). Indeed, the two crimes allegedly committed by Mr. Ahmed do not confirm that an individual is sympathetic to terrorism. They are actions committed for personal gain. Mr. Ahmed pleaded not guilty to the charges. Record 7. Although a trial date was not scheduled until July 2003, Mr. Ahmed was detained without an opportunity to be released on bail. Record 7. Instead, he was left in a jail cell for almost a year and a half, with no prospect of a speedy trial. Two days before Mr. Ahmed's trial was to begin, the government filed an ex parte motion to dismiss the indictment, based on an order signed by the President determining that Mr. Ahmed was an enemy combatant. The motion to dismiss the criminal charges against Mr. Ahmed was granted and he was transferred to military custody, where he resides to this day. Mr. Ahmed, the promising veterinary student, remains 8 years later, in a prison cell run by the military -- still without charges, without trial, without an end date in sight - a mockery of the American system of fairness, justice and the due process guaranteed to him by the Fifth Amendment.

The writ of habeas corpus remains available to every individual detained within the United States, absent its suspension. *Hamdi*, 542 U.S. at 525 (citing U.S. Const. Art. I, § 9, cl. 2). Like *Hamdi*, Ahmed was properly before an Article III court to challenge his detention under 28 U.S.C. §2241. The provisions for challenging detention under 28 U.S.C. § 2241 provide a simple outline of the procedures to be afforded a petitioner in a federal habeas review. *Id.* As acknowledged in *Hamdi*, those procedures ensure that habeas petitioners would have some opportunity to present and rebut facts and that courts retain the ability to vary the ways in which they do so as mandated by due process.

The government in Mr. Ahmed's case argues that, in adhering to the procedural framework established in *Hamdi* for habeas corpus proceedings in enemy combatant cases, it has provided adequate due process. However, the *Hamdi* discussion of procedural due process noted "the exigencies of the circumstances may demand that, aside from these core elements [of essential constitutional promises], enemy combatant proceedings *may* be tailored to alleviate the uncommon potential to burden the Executive at the time of ongoing military conduct". *Hamdi*, 542 U.S. at 532 (2004) (emphasis added). The Twelfth Circuit held that the district court erred in rigidly applying the *Hamdi* burden-shifting framework to the different

circumstances of Mr. Ahmed's seizure and detention. Record 26. The "exigent circumstances" of capture of Hamdi on the battlefield in Afghanistan cited by this Court to justify an exception to the usual legal procedures were not present in the arrest of Mr. Ahmed at his home in Wilson, East Dakota. Mr. Ahmed, as a legal resident arrested in the United States, is entitled to the procedures for a federal habeas petition enumerated in 28 U.S.C. § 2241.

As in *Hamdi*, an inherent tension exists between the government's national security concerns and the due process which Mr. Ahmed is entitled before he is deprived of his constitutional rights. The *Hamdi* court, in evaluating the due process to be afforded, relied on the test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), for balancing those competing interests and determining the procedures necessary to ensure a citizen is not deprived of his rights under the Fifth Amendment. *Hamdi*, 542 U.S. at 528. *Mathews* mandated that the process due in any given circumstance 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 burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 528 (citing *Mathews*, 424 U.S. at 335).

The *Hamdi* court reaffirmed "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law" and weighed "the opposing governmental interests against the curtailment of liberty that such confinement entails." *Hamdi*, 542 U.S. at 530. In applying the *Mathews* test to the process to be afforded detainees in normal habeas proceedings, this Court noted that it requires a "judicious balancing of the government and individual concerns through an analysis of 'the risk of erroneous deprivation 'of the private interest if the process were reduced and the 'probative value, if any, of additional or substitute procedural safeguards'" *Hamdi*, 542 U.S. at 529 (citing *Mathews*, 424 U.S. at 335). If "procedural due process rules are meant to protect persons not from the deprivation but from the mistaken or unjustified deprivation of life, liberty or property," *Carey v. Piphus*, 435 U.S. 247, 259 (1978), then the procedural rules must surely protect Mr. Ahmed, who has been unjustifiably detained by the military without charge or trial and with no indication when his detention will end. *Hamdi*, 542 U.S. at 529 (citing *Mathews*).

Mr. Ahmed, like Hamdi, is guaranteed that fundamental right of due process. The Twelfth Circuit ruled that the lower court ignored the *Hamdi* directive and did not give sufficient attention to these competing interests. Record 24-25. It noted

that Mr. Ahmed's "most elemental liberty interests" in being free from detention by his own government are the same as Hamdi's. However, the risk of erroneous deprivation is much greater in this case since Mr. Ahmed was captured by civilian authorities who failed to adhere to the protocols of criminal procedure. Record 25. Further, it concluded that "the constitutional guarantee of due process requires at the very least that the government be required to demonstrate why any limitations based on the normal habeas procedure would be necessary in this case". Record 26.

C. The District Court Erred In Accepting The Murphy Declaration As The Most Reliable Evidence.

This Court in *Hamdi* emphasized that procedural due process mandates that "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Hamdi*, 542 U.S. at 532. It noted that "it is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'". *Id.* Applying the *Mathews* balancing test, this Court concluded the process required that "a citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the

Government's factual assertions before a neutral arbiter." *Id.* at 533.

This fundamental right to be notified and to be heard has been unconscionably disregarded by the government in Mr. Ahmed's case. Instead, the only evidence the government could develop was a hearsay document, the Murphy Declaration, a summary of statements providing a "connect-the dots" picture of alleged activity by Mr. Ahmed. Record 47-48 ("Appendix A"). Murphy, an employee of the government himself, was merely a compiler of data, with no firsthand knowledge of the facts or their veracity. In *Hamdi*, this Court acknowledged the difficulties of establishing a trial-like process while military officers are "engaged in the serious work of waging battle" and the futile search for evidence under the rubble of war". Noting that in a "limited" category of circumstances, hearsay "may need to be accepted as the most reliable available evidence", this Court permitted the government to establish its case through hearsay affidavits. *Hamdi*, 542 U.S. at 531-32. It did not, however, address the due process problems of admitting hearsay in other contexts or the application of the Federal Rules of Evidence. Here, however, there is no rubble to be searched in East Dakota, no rumble of distant war battles being waged; the government's burdens that supported the use of hearsay evidence in *Hamdi* are

not present. The Twelfth Circuit held that, considering the circumstances of Mr. Ahmed's seizure and detention, the district court should not have accepted the Murphy Declaration as the most reliable evidence available without questioning whether requiring the government to produce non-hearsay evidence would be unduly burdensome or would threaten to interfere with the military's ability to carry out its mission on the field of battle." Record 23. The most reliable available evidence from the government to support their position is not the Murphy declaration; it is the statements of the witnesses themselves. The government's failure to provide the "most reliable available evidence" deprives Mr. Ahmed of his opportunity to defend himself. The Twelfth Circuit concluded that the district court erred in finding that the procedures afforded Mr. Ahmed were consistent with these rights. Record 23.

CONCLUSION

For the foregoing reasons, the judgment below that the president has legal authority to detain Mr. Ahmed as an "enemy combatant" based on the facts alleged should be reversed, the judgment below that the process afforded by the district court to Mr. Ahmed to challenge his designation as an "enemy combatant" was not sufficient under the requirements of the Fifth Amendment should be affirmed, and the case remanded with instructions that the habeas corpus petition be granted and the government be directed to release Petitioner from military custody forthwith.

Respectfully submitted,

Team 3554

Counsel of Record