

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 THE RESPONDENT

Team # 1650.

QUESTIONS PRESENTED

1. Whether the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)) (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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The opinion of the court of appeals is reported at ___ F.3d ___ (2008). The opinion of the district court is reported at ___ F. Supp.2d ___ (2003).

JURISDICTION

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

RELEVANT CONSTITUTIONAL AND STAUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment, US Const., amend. V, requires that no person be "deprived of life, liberty, or property without due process of law." The Take Care Clause, art. II, § 3, gives the President the authority to "take Care that the Laws be faithfully executed." The President's Commander-in-Chief power, art. II, § 2, cl. 1: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Relevant statutory provisions are reprinted in the appendix to this brief.

FACTS

On September 11, 2001, members of the al Qaeda terrorist network hijacked commercial airlines and used them to launch an

attack on the United States, killing approximately 3000 people. Congress responded to the attacks a week later by passing the AUMF, which authorized the President to use "all necessary and appropriate force" against individuals and organizations involved in the 9/11 attacks. 115 Stat. 224.

Petitioner Burhan Uddin Ahmed is a citizen of Pakistan who entered the United States lawfully on September 8, 2001, to pursue a doctor of veterinary medicine degree at Wilson University in Wilson, East Dakota. Federal agents arrested Ahmed on January 3, 2002, in connection with their investigation into the 9/11 attacks and subsequently charged him in November 2002 with possession of counterfeit Social Security cards with intent to defraud. Ahmed was further charged in January 2003 with making a false statement to the FBI.

On June 13, 2003, the government filed an ex parte motion to dismiss the indictment based on an order signed by the President of the United States. The President's order designated Ahmed an enemy combatant and thus should be detained by the Secretary of Defense. The District Court of East Dakota granted the motion and Ahmed was transferred to military custody, where he has been held without charge or trial.

PROCEDURAL POSTURE

After transfer to the military facility, Ahmed filed a petition for a writ of habeas corpus in the District of East

Dakota under 28 U.S.C. § 2241 to secure his release from military detention. The petition asserted that the government must either file criminal charges against him or release him. Alternatively, the petitioner argued that he must be afforded a hearing to challenge the factual basis of the allegations.

Respondents argued that the President had statutory authority under the AUMF, 115 Stat. 224, and inherent constitutional authority to indefinitely detain Ahmed. Respondent further argued that the process afforded Ahmed was sufficient to challenge his detention. To support its position, respondent submitted a hearsay document, the Declaration of John R. Murphy (Murphy Declaration), who is Director of the Joint Task Force for Combating Terrorism, which detailed Ahmed's involvement in al Qaeda.

The district court agreed that Ahmed could be held as an enemy combatant, but found that he was entitled to challenge the factual basis of his detention. The court remanded to the magistrate judge to determine the proper process due Ahmed. The magistrate judge held that the Government must provide Ahmed with notice of the factual basis of his detention, but that if the Government could produce credible evidence supporting Ahmed's enemy-combatant designation, the burden would shift to Ahmed to refute the designation with more persuasive evidence. The magistrate judge found that the Murphy Declaration provided

sufficient factual basis for the detention and gave Ahmed 60 days to rebut the evidence.

Ahmed responded with a general denial and insisted that the procedures adopted by the magistrate judge were unconstitutional. Because Ahmed did not provide evidence, the magistrate judge recommended that his petition for a writ of habeas corpus be dismissed. The district court agreed.

Ahmed appealed the district court's decision and a panel of the Court of Appeals for the Twelfth Circuit affirmed the district court's dismissal. Upon Ahmed's motion for rehearing, the circuit court voted to vacate the panel opinion and hear the case en banc. The circuit court held that the AUMF empowered the President to detain Ahmed as an enemy combatant and that Ahmed was not afforded sufficient process to challenge his designation.

SUMMARY OF ARGUMENT

Petitioner's designation as an enemy combatant is authorized both by the AUMF and by the President's inherent constitutional authority. Furthermore, the process afforded to petitioner was sufficient under the Fifth Amendment to challenge his designation as an enemy combatant.

ARGUMENT**I. Authority of the President to Detain Ahmed as an "Enemy Combatant"**

The President has legal authority to detain Ahmed as an enemy combatant because of his association with al Qaeda. His legal authority is derived both from the AUMF, 115 Stat. 224, and from the President's inherent constitutional authority to detain an enemy combatant for the duration of the hostilities. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Thomas, J., concurring).

A. The President's Power to Detain Enemy Combatants under the AUMF

While the Constitution generally affords protection for civilians against military detention, it offers an exception for the detention of enemy combatants during active hostilities. *See Hamdi*, 542 U.S. at 519-521; *see also United States v. Salerno*, 481 US. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception"). The President may elect to exercise his legal authority to detain an enemy combatant without charge or criminal proceedings "for the duration of the relevant hostilities." *See Hamdi*, 542 U.S. at 519-21.

The President, under the AUMF, has authority to designate and hold Ahmed as an enemy combatant. The AUMF, passed in

response to the terrorist attacks of 9/11, 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." 115 Stat. 224. Because the AUMF authorizes the use of "all necessary and appropriate force," the AUMF can be correctly classified as a full congressional authorization for the use of force, which activates all of the President's war-making powers. See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541) (establishing that the President's constitutional Commander-in-Chief powers can be activated by a declaration of war, specific statutory authorization, or a national emergency). A congressional authorization, like the AUMF, is sufficient to activate all of the President's war-making powers, even in the absence of a declared war. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2060 (2005). In fact, a sizeable majority of American armed conflicts have been initiated not by a formal declaration of war, but by a congressional authorization to use force. See Act of May 28, 1798, ch. 48, 1 Stat. 561 (authorizing force against French naval vessels during the Quasi-War of the 1790s); Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (authorizing the use of force

in Vietnam); Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, §§ 3-4, 6, 97 Stat. 805, 806-07 (1983); Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8151, 107 Stat. 1418, 1475-77 (authorizing force in Somalia in 1993). The Court has even upheld the use of force in the absence of any congressional authorization. See *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 675 (1863) (upholding an executive order to blockade the Southern ports during the Civil War while Congress was in recess). Congressional authorizations and the longstanding executive practice of treating such authorizations as a full activation of the President's war-making powers indicate that Congress intended to grant the President all the necessary powers, including detention, to combat terrorism by passing the AUMF. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (finding that a "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent"). Furthermore, that the AUMF itself is broader than other congressional authorizations indicates that Congress recognized that the unique aspects of the War on Terror required the executive to be vested with the broadest possible range of war powers. See generally Curtis A. Bradley et al., *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. at 2082.

The activation of the President's constitutional war powers extends to all incidents of armed conflict, including the detention of enemy combatants. See *Hamdi*, 542 U.S. at 518. While the AUMF did not explicitly authorize detention, the *Hamdi* plurality held that the detention "of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* Because it is a fundamental incident of war, the AUMF overrides the Non-Detention Act in the narrow circumstances of Ahmed's capture and detention. See 18 U.S.C. § 4001(a) (2006); see also *Hamdi*, 542 U.S. at 519 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant").

While Congress implicitly authorized the President to detain enemy combatants, the AUMF was less clear on whom the President could designate and detain as an enemy combatant. The Court has held that those who were captured or who had been engaged in active combat in Afghanistan can be detained by the President as enemy combatants. See *Hamdi*, 542 U.S. at 518. The *Hamdi* plurality held that because Hamdi 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," he clearly fell within the definition of an enemy combatant. *Id.* at 516. This characterization of enemy combatants is consistent with *Ex parte Quirin*, 317 U.S. 1 (1942), which "held that '[c]itizens 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.'" *Hamdi*, 542 U.S. at 519 (quoting *Quirin*, 317 U.S. at 37-38). *Quirin* involved the military trial of alleged Nazi spies who entered the country to sabotage facilities. 317 U.S. at 21-22. Neither *Quirin* nor *Hamdi* indicate that an enemy combatant's status as an American citizen would limit the President's authority to classify him as an enemy combatant. *See id.* at 37 (holding that 'citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war'); *see also Hamdi*, 542 US. at 519. These two cases received further support in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), where the Fourth Circuit held that the AUMF authorized the military detention of Jose Padilla:

[Padilla is] a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war, who took up arms on behalf of that enemy and against our country in a foreign combat zone of war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.

Id. at 389. Both *Hamdi* and *Padilla* are grounded in the idea that the AUMF authorizes military detention of any combatant who previously took up arms against the United States. See *Hamdi*, 542 U.S. at 518; *Padilla*, 423 F.3d at 391.

Ahmed does not fall into the *Hamdi* and *Padilla* framework because he has not fought in Afghanistan. But the AUMF was not targeted only at ex-Taliban and ex-al Qaeda fighters in Afghanistan; rather, it was aimed at combating domestic terrorism because the detention of an al Qaeda operative as an enemy combatant is consistent with both the language and purpose of the AUMF. The AUMF authorizes force (and thus authorizes detention) against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Id.* The authorization of force against organizations clearly includes al Qaeda, the organization that organized and executed the 9/11 attacks. The language of the AUMF itself and the context in which it was passed indicate that al Qaeda sleeper agents who were sent to the United States to conduct acts of terrorism, like Ahmed, "are individuals Congress sought to target in passing the AUMF." See *Hamdi*, 542 U.S. at 518. Ahmed falls within the class of persons targeted by the AUMF because he intended to attack the United States. See *Hamdi*, 542

U.S. at 518; see also *Quirin*, 317 U.S. at 37-38 (adopting a broad definition of "enemy combatant" that includes all who "enter this country bent on hostile acts"); cf. *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (holding that a non-military individual arrested in the United States cannot be subject to military detention despite his association with al Qaeda). In other legislation, Congress defined an enemy combatant as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." See Military Commissions Act of 2006, 10 U.S.C. § 948(a)(1)(i).

In the unique circumstances of the War on Terror, a restriction of the President's power to detain only identifiable members of the armed forces of an enemy would undermine the purposes of the AUMF. See *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) (noting that "[t]he unconventional aspects of the present struggle do not make its stakes any less grave"). Support for this erroneous restriction is based on *Ex parte Milligan*, 71 U.S. 2 (1866). In *Milligan*, Lambdin P. Milligan and four co-conspirators planned to steal weapons in Indiana and use them to further the Confederate cause; however, the Court held that they should be tried in civilian courts. *Id.* at 67-68.

Milligan, however, has since been limited to its facts. See *Quirin*, 317 U.S. at 45 (construing the holding of *Milligan* to apply only with "particular reference to the facts before it," as *Milligan* was not "part of or associated with the armed forces of the enemy"). Al Qaeda, indeed, is a group that has been explicitly identified as an enemy of the United States. See AUMF, 115 Stat. 224.

Furthermore, the Alien Enemy Act, 50 U.S.C. § 21 (2000), supports the notion that noncitizens can be held more readily in certain circumstances. The Alien Enemy Act provides:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government . . . [citizens of that nation may be] apprehended, restrained, secured, and removed.

Id. (cited in Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2083 (2007)). The Act allows the President to determine "the manner and degree of the restraint to which they shall be subject." 50 U.S.C. § 21. The implication from the Act and cases that have interpreted it is that alien enemies may be held for the duration of hostilities in circumstances that citizens may not. See *Ludecke v. Watkins*, 335 U.S. 160, 166 (1948) (upholding invocation of the Alien Enemy Act during World War II). Thus, while *Milligan* may stand for the

proposition that a U.S. citizen may not be detained for involvement with a terrorist-like group, the Alien Enemy Act and the unique circumstances of the present case grant the President more latitude in holding Ahmed, a noncitizen involved in a recognized terrorist group, as an enemy combatant.

Because of the purpose of the AUMF, the location of the arrest should not bear on whether the President can exercise his authority to detain an enemy combatant. 115 Stat. 224. The court in *Padilla* faced this issue because there, the suspect was captured trying to enter the United States, unlike in *Hamdi* where the arrest took place on a foreign battlefield. See *Hamdi*, 542 U.S. at 510; compare *Padilla*, 423 F.3d at 389. The *Padilla* Court gave no weight to the location of the arrest, asserting rather that it was Padilla's attempted entry to the United States "for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets" that granted the President the authority to detain him as an enemy combatant. *Id.* The very purpose of the AUMF was to stop domestic terrorism before it happened, so it would be counterproductive to hold that the President can detain only those enemy combatants whom he finds outside of the country when those inside are the real threat. See 115 Stat. 224.

Because the AUMF authorizes detention of al Qaeda members, the President has the authority to determine to whom it is

applied. The AUMF itself vests the discretion in the President: "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons *he determines*. . ." *Id.* (emphasis added). Because the AUMF explicitly delegates discretion to the President, the Court should view the President's determinations with great deference. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (finding that Presidential action "pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation"). Furthermore, the AUMF's implicit authorization of the detention of enemy combatants can be viewed as congressional acceptance of a longstanding executive practice. See *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring) ("In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II"). The detention of enemy combatants has long been recognized as a crucial aspect of war-making power, and thus:

[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave

public danger are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Quirin, 317 U.S. at 25. The decision to hold an enemy combatant could also be construed as a military decision and thus vested exclusively in the President. See *Hirota v. MacArthur*, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("The capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander in Chief, and as spokesman for the nation in foreign affairs, had the final say").

Subsequent legislation has not limited the President's authority to designate and hold enemy combatants. Congress' passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), § 236(a), Pub. L. No. 107-56, 115 Stat. 272 (codified at 8 U.S.C. §1226(a) (2006)), allows for short-term detention of terrorist aliens, but specifically prohibits indefinite detention. However, the Patriot Act is inapplicable to the President's authority to detain enemy combatants under the AUMF because the Patriot Act was aimed only at civilian detentions, not at military detentions. See Gregory H. Shill, *Enemy Combatants and a Challenge to the Separation of Powers in Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), 31 Harv. J.L. & Pub. Pol'y 393, 407-08 (2008). The Patriot Act thus

modifies the President's power under Article II § 3 to "take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3, and not the President's Commander-in-Chief power, which was activated by the AUMF. See art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States").

Reading the AUMF to authorize the detention of Ahmed is in keeping with the purposes of the Act, and, within the narrow circumstances of his case, properly accounts for Ahmed's countervailing liberty interest. See *Hamdi* at 535 (cautioning that detentions must satisfy individualized review).

B. The President's Inherent Constitutional Authority to Detain "Enemy Combatants"

In addition to statutory authorization, the President can lawfully detain Ahmed under his inherent constitutional authority. His authority stems from two sources: one, his inherent power under Article II to wage war, and two, his authority when acting with the express consent of Congress.

The President's first source of inherent constitutional authority stems from his power to wage war. See *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and

as the Nation's organ in foreign affairs"). The Court has held that military detention is a "fundamental incident of waging war," so it is well within the President's constitutional authority to exercise that power in wartime. See *Hamdi*, 542 U.S. at 519. The President's inherent war-making powers are supplemented by the Court's traditional deference to the executive on matters of foreign affairs. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

The passage of the AUMF indicates that the President's power is "at its maximum" because he is acting with express congressional consent. See *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Because the President designated Ahmed as an enemy combatant pursuant to the express authorization of Congress, his designation merits "the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." See *id.* at 636-37.

II. The Process Afforded to Challenge a Designation as an "Enemy Combatant" was Sufficient under the Requirements of the Fifth Amendment

The district court afforded Ahmed sufficient due process to challenge his designation as an enemy combatant by requiring the government to provide notice of the factual basis of Ahmed's detention, by providing Ahmed representation, by setting a preponderance standard with which Ahmed might argue his

innocence, and by placing Ahmed's case before a neutral decision-maker.

A. Due Process Required by Fifth Amendment

The Fifth Amendment requires that no person shall be "deprived of life, liberty, or property without due process of law. U.S. Const., amend. V. The writ of habeas corpus serves "as a means of reviewing the legality of Executive detention." See *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001). Normal habeas proceedings are governed by 28 U.S.C. § 2241 and its companion provisions. The core purpose of § 2241 is to provide habeas petitioners with some opportunity to present and rebut facts, but it reserves for the courts the authority to determine how the petitioner will do so based on the particular circumstances of a given case. See *Hamdi*, 542 U.S. at 526 ("Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts[, but] . . . courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process").

The unique circumstances of the capture and detention of suspected enemy combatants is one area in which the courts must vary their habeas review. The *Hamdi* Court addressed this issue and determined that the Government must provide "notice of the factual basis for [the detainee's] classification" as an "enemy combatant," and that it must afford the detainee an opportunity

to produce "more persuasive evidence" that he is not an enemy combatant. *Id.* at 539. In the instant case, the district court, following the *Hamdi* framework, offered Ahmed two months' time with which to prepare his rebuttal, afforded him an opportunity to produce more persuasive evidence to convince a neutral court that he was not an enemy combatant, and required the government to provide notice for the factual basis of Ahmed's classification.

The *Hamdi* framework was arrived at by balancing "the 'risk of erroneous deprivation' of a detainee's liberty interest," *Id.* at 534 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)), with the government's "interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." 542 U.S. at 531-32. The *Hamdi* framework allowed Hamdi to challenge the detention without compromising the national security of the United States and was an exercise of the discretion Congress gives to all courts in determining the proper habeas procedure for a given case.

B. Ahmed is Entitled to Equal or Fewer Protections than Hamdi

Since Ahmed was afforded the precise protections endorsed by the Court in *Hamdi*, the legitimacy of Petitioner's and Respondent's arguments turns on whether, and to what extent, the fact pattern of the instant case alters the implementation of

the *Mathews* balancing test from its use in *Hamdi*. Thus we consider Ahmed's relationship to Hamdi in the context of each side of the *Mathews* balance: the avoidance-of-erroneous-deprivation interest and the safe-conduct-of-war interest.

In relying on the *Mathews* balancing test, the *Hamdi* Court recognized "the 'risk of erroneous deprivation' of a detainee's liberty interest." 542 U.S., at 534. Neither Ahmed's risk of erroneous deprivation nor his liberty interest exceeds those of Hamdi. First, Ahmed's status as an alien implies that he is entitled to, at maximum, the same protection of liberty as was afforded Hamdi. While the Court in *Hamdi* did not explicitly state that a noncitizen would not be entitled to the same procedural protections as a citizen, the Court's language did limit its affirmation of combatant-status review due process rights to American citizens, "We reaffirm today the fundamental nature of a *citizen's* right to be free from involuntary confinement *by his own government* without due process of law." *Id.* at 531 (emphasis added). The Court continued, "[W]e believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance *when a United States citizen is detained in the United States* as an enemy combatant." *Id.* at 532 (emphasis added). In other contexts, Congress has authorized and the Court has upheld limitations on an alien's

due process rights if exercising those rights would endanger national security. See 50 U.S.C. § 21 (2000) (authorizing the President to detain an enemy alien for the duration of hostilities when there is a declared war). Ahmed was afforded the same process that Hamdi was ruled to deserve, even though his status as an alien may have justified a more limited chance to "present and rebut facts." See *Hamdi*, 542 U.S. at 526.

Second, the fact that Ahmed was captured at home, rather than on an archetypal "battlefield," introduces no greater risk of erroneous deprivation than if he had been captured in Afghanistan. The Fourth Circuit in *Padilla* addressed this concern and held that "*Hamdi* itself provides process to guard against the erroneous detention of non-enemy combatants." 423 F.3d at 394. The *Padilla* Court placed no emphasis on the location of Padilla's arrest; rather, the determining factor was that he entered the United States "for the avowed purpose of further prosecuting the war on American soil." *Id.* at 389. Ahmed's situation is similar: he is an al Qaeda operative who was coordinating an attack on the United States. The President designated him as an enemy combatant following an exhaustive internal review process. As long as the *Hamdi* framework is properly followed, an alleged enemy combatant captured in the United States is no more likely than one captured abroad to be unaware of the reasons for his detention. Being plucked from a

population of civilians as opposed to a population of militants may present more uncertainty at the earliest stage, but in this instance, the district court followed *Hamdi's* recommendation and required the Government to provide Ahmed with detailed factual notice of the basis for his enemy combatant designation. See 542 U.S. at 533. The Government did so, and thus Ahmed cannot claim ignorance as to why the Government classified him as an enemy combatant.

Third, with respect to erroneous deprivation, the use of a hearsay document against Ahmed is no less acceptable than the Court-approved use of a hearsay document against Hamdi. The Court ruled there that the Government may meet its initial burden by presenting evidence from "a knowledgeable affiant" who "summarize[s]" the factual basis for the detainee's enemy combatant status. *Id.* at 534. The *Hamdi* Court held that "[h]earsay ... may need to be accepted as the most reliable available evidence from the Government in such a proceeding." *Id.* It also recognized that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Id.* This presumption is standard practice for traditional habeas actions. See *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995) ("[T]he habeas petitioner generally bears the burden of proof"); *Eagles v. United States*

ex rel. Samuels, 329 U.S. 304, 314 (1946) (“[Petitioner] had the burden of showing that he was unlawfully detained”); *Williams v. Kaiser*, 323 U.S. 471, 472, 474 (1945); *Walker v. Johnson*, 312 U.S. 275, 286 (1941); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

Since the use of a hearsay document and a presumption for the Government constituted acceptable process for Hamdi, it would, *a fortiori*, also constitute acceptable process for Ahmed. Even further, the Murphy Declaration used against Ahmed explicates a factual basis that is considerably more detailed and thorough than the Mobbs Declaration used against Hamdi. Consider the contrast; the following is typical fare for the nine-paragraph Mobbs Declaration:

7. At the Sheberghan prison, Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants over whom the United States was taking control...

Id., Section 7. The seventeen-paragraph Murphy Declaration, meanwhile, contains considerably more information about the detainee’s specific activities:

16. After September 11, 2001, calling cards and cellular phone accounts attributed to Ahmed were used to attempt to contact a high-ranking al Qaeda officer known to be residing in the United Arab Emirates. Calls to the same number were made by several pay phones in the Wilson, East Dakota, area.

Id., Section 16. The less-specific Mobbs Declaration was deemed by the Court to be sufficient: “As we have

discussed, a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return." *Hamdi*, 542 U.S. at 539. The use of hearsay evidence was explicitly authorized by the *Hamdi* Court, and so the use of a more detailed hearsay document satisfies the *Hamdi* framework.

In relying on the *Mathews* balancing test, the *Hamdi* Court also recognized the government's "interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Id.* at 531-32. The likelihood that Ahmed might return to battle against the United States is no less than that of Hamdi. Ahmed's arrest, like Hamdi's, occurred in an area in which the enemy combatant presented a clear and present danger to the safety of the United States. *See id.* at 513. Indeed, domestic terrorism renders the country itself analogous to a combat zone. As the Court acknowledged in *Hamdi*:

[T]he circumstances surrounding Hamdi's seizure cannot in any way be characterized as 'undisputed' ... Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States' to justify his detention in the United States for the duration of the relevant

conflict for the duration of the relevant conflict. The habeas petition states only that "[w]hen seized by the United States government, Mr. Hamdi resided in Afghanistan.

Id. at 527-28 (internal citations omitted). Hamdi's status as having been captured on the "battlefield" or "combat zone" is no clearer than Ahmed's; as described in the Murphy Declaration, Ahmed was captured while in the process of pursuing work that aided the terrorist network al Qaeda at the expense of the United States' national security. Specifically, the President's executive order maintained that Ahmed: is closely associated with al Qaeda; "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism"; "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda"; and "represents a continuing, present, and grave danger to the national security of the United States."

Thus, there can be no determination that the release of Hamdi, or his exposure to classified evidence, would have represented a heightened risk that is not present in Ahmed's situation. Ahmed may have been captured by civilian authorities, but those civilians were FBI agents investigating a terror threat. To make a distinction between the perils of war in Afghanistan and the perils of terror at home is impractical and

contrary to the express will of Congress. See AUMF, 115 Stat. 224. In either case, too, the release of classified information would be highly dangerous.

Ahmed argues for a curious calibration of the *Mathews* liberty and security interests. In denying that the use of the Murphy Declaration properly accounts for the risk of erroneous deprivation in the context of security concerns, he argues that *Hamdi* actually requires the Government to present "the most reliable available evidence" and to demonstrate to the court why no more reliable evidence is available. This misreads the Court's use of the phrase by ignoring its context:

[T]he exigencies of the circumstances may demand that, aside from these core [due process] elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.

542 U.S. at 533-34. The excerpt does not endorse an unflinching requirement of "the most reliable available evidence" in every case. Rather, it merely notes that hearsay evidence was the best the Government could offer in *Hamdi*. The phrase is not a standard; nowhere else in the opinion is the phrase used. Furthermore, any such reading of an expansive, specific standard would fail to take into consideration the *Hamdi* Court's balancing of Petitioner's

liberty interest with the security interests of the nation as a whole. See *id.* at 531-32. Recognizing the difficulties that a full habeas proceeding would have on the proper conduct of the war, the Court held that the Government need not provision witnesses because it would "unnecessarily and dangerously [distract military personnel with] litigation half a world away," *Id.* at 531-32, and that discovery would reveal evidence that 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 532. The reasoning is that while the Government may have more reliable evidence, it need not divulge such evidence when it would either unduly impact the Government's efforts to combat terrorism or compromise national security interests. The same factors the *Hamdi* Court weighed are present in Ahmed's case: divulgence of more reliable evidence to support the indefinite detention of Ahmed would impair the Government's ability to prosecute the war on terrorism at home and compromise sensitive intelligence. The only standard the Court has provided with respect to the furnishing of evidence is that such evidence must provide "notice of the factual basis for [the detainee's] classification." *Id.* at 533. The Murphy Declaration satisfies that test.

In Ahmed's case, the *Hamdi* framework was followed and thus the protection afforded to Ahmed was sufficient to give "notice of the factual basis for his classification"; Ahmed also received "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* Only a clear divergence in fact pattern would entitle Ahmed to elevated protections. For the foregoing reasons, there is no such divergence: Ahmed has no greater risk of erroneous deprivation, and the Government has no less of an interest in ensuring that an enemy combatant does not return to battle against the United States.

Conclusion

The judgment of the Twelfth Circuit should be affirmed as to the President's authority to designate Ahmed as an enemy combatant. The judgment of the Twelfth Circuit should be reversed as to its finding that the process afforded to Ahmed was not sufficient to challenge his designation as an enemy combatant.