

No. 08-11144

IN THE
Supreme Court of the United States

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**BURDHAN UDDIN AHMED,
PETITIONER,**

V.

**UNITED STATES OF AMERICA,
RESPONDENT.**

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

BRIEF FOR THE RESPONDENT

TEAM 4305

QUESTIONS PRESENTED

1. Whether the Constitution and Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), enacted in the wake of the September 11 attacks, authorize the President to order military detention, during the war against al Qaeda, of Ahmed, an alien who entered the United States to plan and carry out war-like acts on behalf of al Qaeda, just like the September 11 attackers.
2. Whether the process afforded by the district court to challenge a designation as an "enemy combatant" was sufficient under the requirements of the Fifth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iv

OPINION BELOW.....vii

STATEMENT OF JURISDICTION.....vii

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONSviii

STATEMENT OF THE CASE..... 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 5

 I) The President May Detain Ahmed as an Enemy Combatant Because the AUMF Approves Detention of al Qaeda Warriors and the Government’s Joint War Powers, our “Federal Sovereignty,” Include Power to Detain State Enemies..... 5

 A) THE AUMF AUTHORIZES DETENTION OF AL QAEDA WARRIORS AS ENEMY COMBATANTS BECAUSE THE TEXT GRANTS THE SAME FORCE AGAINST NATIONAL & ORGANIZATIONAL FORCES, & *HAMDI* HAS HELD THE AUMF TO PERMIT DETENTION OF TALIBAN FORCES..... 5

 1) The AUMF Text and Legislative History Indicate Congress’s Approval of Using Military Force Against al Qaeda..... 6

 2) The Text Indicates that Congress Authorized Equally Broad Use of Force Against Nations and Organizations and Hamdi Held this Grant to Include Detention..... 8

 3) Detaining al Qaeda Operatives Is a “Necessary and Appropriate” Use of Force.....10

 a. The AUMF Text & Purposes Indicate that Detaining al Qaeda Operatives Is “Necessary and Appropriate” to Defend Against Future al Qaeda Attacks11

 b. Law-of-War Principles Comport with Treating Ahmed as an Enemy Combatant Subject to Detention.....12

 B) THE COMBINED CONSTITUTIONAL WAR POWERS OF CONGRESS AND THE EXECUTIVE INCLUDE POWER TO DETAIN AL QAEDA OPERATIVES AS ENEMY COMBATANTS..... 16

 II) The Court Afforded Ahmed Sufficient Process to Challenge his Enemy Combatant Status..... 19

 A) THE DISTRICT COURT’S PROCESS WAS SUFFICIENT BECAUSE IT WAS “PRUDENT AND INCREMENTAL” AND PROVIDED MORE THAN THE MINIMUM PROCESS REQUIRED BY *HAMDI*..... 19

 B) AHMED FORFEITED ANY RIGHT TO FURTHER PROCESS BY REFUSING TO PARTICIPATE IN THE CONSTITUTIONALLY VALID PROCEDURE CREATED BY THE DISTRICT COURT.....22

 C) THE TWELFTH CIRCUIT ERRED BY MISAPPLYING BOTH THE FIRST AND SECOND STEPS OF THE *MATTHEWS V. ELDRIDGE* BALANCING TEST 25

D) THE TWELFTH CIRCUIT SHOULD HAVE SHOWN SOME DEFERENCE TO THE DISTRICT
COURT'S DUE PROCESS PROCEDURE, WHICH IS A MIXED QUESTION OF LAW AND FACT.....29

CONCLUSION30

TABLE OF AUTHORITIES

Cases

Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008). 9, 13, 14, 15

Bertucci Contracting Corp. v. M/V Antwerpen, 465 F.3d 254 (5th Cir. 2006) 29

Boumediene v. Bush, 128 S. Ct. 2229 (2008)..... 26

Commissioner v. Duberstein, 363 U.S. 278 (1960)..... 29

Davis v. United States, 411 U.S. 233(1973)..... 23

Dobson v. Commissioner, 320 U.S. 489 (1943)..... 29

Ex Parte Milligan, 71 U.S. 2 (1866)..... 18

Ex Parte Quirin, 317 U.S. 1 (1942)..... 13, 18

FCC v. Nextwave Personal Communications, Inc., 537 U.S. 293 (2003). 9

Francis v. Henderson, 425 U.S. 536 (1976)..... 22, 23

Garlotte v. Fordice, 515 U.S. 39 (1995)..... 21

Haig v. Agee, 453 U.S. 280 (1981)..... 25

Hamdan v. Rumsfeld, 548 U.S. 557, 568 (2006)..... 1, 13, 14

Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004)... 9, 12, 18, 19, 20, 25, 30

Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919) 18

Holloway v. United States, 526 U.S. 1, 6 (1999)..... 6

In re Extradition of Howard, 996 F.2d 1320 (1993)..... 29

Lamar v. Browne, 92 U.S. 187 (1875)..... 13, 15

Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005)..... 15

Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994)..... 6

The Protector, 79 U.S. 700 (1871)..... 18

U.S. v. Salerno, 481 U.S. 739 (1987)..... 25

<i>United Savings Ass'n v. Timbers of Inwood Forest Assoc.</i> , 484 U.S. 365 (1988).....	11
<i>United States v. Hartwell</i> , 73 U.S. 385 (1868).....	16
<i>Wilkinson v. Austin</i> , 545 U.S. 209 (2005).....	27
<i>Wirtz v. Bottle Blowers Ass'n</i> , 389 U.S. 463, 468 (1968)....	6, 10
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	16, 17
Constitutional Provisions	
U.S. Constit. art. I, § 8.....	16
U.S. Constit. art. II, § 2.....	16
U.S. Constit. art. II, § 1.....	16
Statutes	
Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).....	i, vii, 1, 6, 7, 9, 11
Other Authorities	
Al Baker, <i>Authorities on Alert After Report of Al Qaeda Plot</i> , N.Y. Times, Nov. 26, 2008, available at www.nytimes.com	19
Gabor Rona, <i>An Appraisal of US Practice Relating to "Enemy Combatants"</i> , 10 Y.B of Int'l Humanitarian L. 232 (2007).....	14
<i>Holy Warriors Escalate an Old War on a New Front</i> , N. Y. Times, Sept. 16, 2001, available at www.nytimes.com	7
Int'l Comm. of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, at 1, 3 (July 21, 2005), available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705? opendocument	14
Mobbs Declaration, available at http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbshamdi.html	21
President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001), available at http://www.september11news.com/PresidentBushSpeech.htm	9
Stephen Engelberg, <i>One Man and a Global Web of Violence</i> , N.Y. Times, Jan. 14, 2001, available at www.nytimes.com	14
Treatises	
2A Norman J. Singer and J.D. Shambie Singer, <i>Sutherland Statutory Construction</i> (7th ed. 2007).....	16

William Winthrop, *Military Law and Precedents* 668 (2d ed., Arno Press, 1979) (1920) 12, 13

Regulations

Military Order of Nov. 13, 3. C.F.R. 918, § 1(a) (2001).. 1, 6, 7

OPINION BELOW

The opinion for the United States Court of Appeals for the Twelfth Circuit, *Ahmed v. United States*, No. 06-9701, slip op. at 7 (12th Cir. Nov. 24, 2008), is not yet reported and is set forth in the Record at pages 5-46.

STATEMENT OF JURISDICTION

Petitioner Burdhan Uddin Ahmed invoked the jurisdiction of the district court by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2241. The district court, which had jurisdiction under 28 U.S.C. § 1331 and § 2241, dismissed Ahmed's petition. Ahmed filed a timely notice of appeal and a panel of the Twelfth Circuit affirmed the district court's dismissal. The court of appeals then voted to rehear the case *en banc*. Sitting *en banc*, the court affirmed in part and reversed in part on November 24, 2008. Ahmed timely filed a petition for a writ of certiorari, which this Court granted on October 2, 2009. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291 and § 2253(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 8:

The Congress shall have power . . .

To declare war, . . . and make rules concerning captures on land and water . . .

To make rules for the government and regulation of the land and naval forces . . .

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

U.S. Const. art. II, § 1:

The executive power shall be vested in a President of the United States of America.

U.S. Const. art. II, § 2:

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 . . .

U.S. Const. art. II, § 3:

[He] shall take care that the laws be faithfully executed . . .

U.S. Const. amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

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

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title.

This joint resolution may be cited as the "Authorization for Use of Military Force".

Section 2. Authorization for Use of the United States Armed Forces.

(a) In General. 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.

(b) War Powers Resolution Requirements.

(1) Specific Statutory Authorization. Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of Other Requirements. Nothing in this resolution supersedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

STATEMENT OF THE CASE

Al Qaeda operatives hijacked and crashed two commercial airplanes into the Twin Towers and the Pentagon on September 11, 2001, causing chaos, injury, and death. *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006). Approximately 3,000 innocent civilians died, making this the most destructive attack on U.S. soil in our nation's history. *Id.* The force responsible for orchestrating the 9/11 attacks was al Qaeda, a massive international terrorist network. Military Order of Nov. 13, 3. C.F.R. 918, § 1(a) (2001).

The following week Congress authorized the President to "use all necessary and appropriate force against those nations [and] organizations" responsible for the 9/11 terrorist attacks. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress aimed "to prevent any future acts of international terrorism against the United States" by the parties responsible for 9/11. *Id.* Congress found that those responsible for 9/11 pose an "extraordinary threat to the national security and foreign policy of the United States." *Id.* Congress viewed the force it authorized as an act of "self-defense" to "protect United States Citizens both at home and abroad." *Id.* Under this authorization, the President sent troops to Afghanistan to target al Qaeda and the Taliban, which harbored al Qaeda. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567-68 (2006).

Three days before the 9/11 attacks, Burdhan Uddin Ahmed, a Pakistani citizen, entered the U.S. purportedly to study at Wilson University in Wilson, East Dakota. R. at 7. Yet, when federal officials arrested Ahmed in Wilson four months later, in

January 2002, the University had placed him in failing status due to consistent absenteeism. *Id.* at 47.

Then, in November 2002, the federal government charged Ahmed in the District of East Dakota with possession of counterfeit Social Security cards with intent to defraud. R. at 7. In June 2003, the government moved to dismiss the indictment based on a presidential order. *Id.* The President found Ahmed to be an enemy combatant closely associated with al Qaeda who had "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism." *Id.* The President also found that Ahmed "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda" and "represents a continuing, present, and grave danger" to U.S. national security. *Id.* Finally, the President determined that the government must detain Ahmed "to prevent him from aiding al Qaeda." *Id.* The District of East Dakota granted the motion to dismiss. *Id.* at 7-8.

Since then, the military has held Ahmed as an enemy combatant. *Id.* at 8. Ahmed filed a petition for a writ of habeas corpus in the District of East Dakota challenging his detention. *Id.* The government opposed Ahmed's release and submitted to the court the Declaration of John R. Murphy (Murphy Declaration)¹ detailing Ahmed's involvement with al Qaeda. *Id.*

According to the declaration, Ahmed trained in an al Qaeda training camp for 18 months, learning, among other skills, about use of poisons. *See id.* at 8, 47-48. Ahmed personally met with

¹ Murphy is the director of the Joint Task Force for Combating Terrorism.

multiple high-ranking al Qaeda leaders, including Osama Bin Laden and 9/11 mastermind Khalid Sheikh Muhammad, and agreed to work in the U.S. as a sleeper agent on a martyr mission. *Id.* at 47. Further, Ahmed received aid in his mission by high-ranking al Qaeda leaders, including Mustafa Ahmed al-Hawsawi, a major financier of 9/11. *Id.* Al Qaeda leaders assigned Ahmed to work, *inter alia*, on a plan to hack into the Social Security Administration's computers to create financial chaos and secure funds for future terrorist attacks. *Id.*

Further, FBI investigations indicated that while in the U.S., Ahmed's cell phone and pay phones in Wilson, East Dakota were used to call a high-ranking al Qaeda officer. *Id.* at 48. Evidence from Ahmed's computer indicated that Ahmed extensively researched use of chemicals as weapons of mass destruction. *Id.* Further, Ahmed's computer contained programs that hackers typically use, computer hacking websites bookmarked, and evidence of efforts to sell Social Security numbers. *Id.*

After the District Court considered the Murphy Declaration, it agreed that Ahmed could be detained as an enemy combatant subject to procedural requirements. *R.* at 9. A magistrate judge then received the case to determine the proper process. *Id.* The judge first permitted Ahmed to propose his preferred procedural process. The judge then required the government to provide Ahmed notice of the factual basis of his detention and to produce credible evidence supporting its enemy combatant designation. *Id.* The judge found that the Murphy Declaration satisfied these requirements. *Id.* The burden then shifted to Ahmed to refute this

designation with more credible evidence within 60 days. *Id.* Ahmed chose to provide no evidence in his defense. *Id.* at 9-10. Based on this refusal to produce evidence, the judge recommended that Ahmed's petition for a writ of habeas corpus be denied. *Id.* at 10. The District Court then denied Ahmed's petition. *Id.*

Ahmed appealed the District Court's decision and the court of appeals affirmed. *Id.* The Twelfth Circuit then granted Ahmed's motion to rehear the case *en banc* and ultimately remanded the case for further procedure, while upholding the military detention as lawful. *Id.*

SUMMARY OF ARGUMENT

The AUMF authorizes the detention of al Qaeda operatives as enemy combatants for two reasons. First, the Court has already held that the AUMF authorizes detention of combatants linked to the Taliban, and the AUMF text does not distinguish between the types of force that the Executive may use against nations versus the organizations responsible for 9/11. Second, treating al Qaeda operatives as enemy combatants in the war against al Qaeda is "necessary and appropriate" because it is an act of self-defense as the AUMF specifies, it comports with laws of war principles, and this construction best harmonizes with the statute's purpose of preventing another 9/11 attack. Further, the government's joint constitutional War Powers include power to detain al Qaeda warriors during the war against al Qaeda.

Further, the Twelfth Circuit's decision as to due process must be reversed because the procedure created by the district court was more than sufficient under *Hamdi*. Further, Ahmed

forfeited his right to further process by refusing to participate in this valid procedure. The Twelfth Circuit reached an erroneous conclusion about the district court's procedure by misapplying the *Matthews* balancing test and wrongly applying *de novo* review.

ARGUMENT

I) THE PRESIDENT MAY DETAIN AHMED AS AN ENEMY COMBATANT BECAUSE THE AUMF APPROVES DETENTION OF AL QAEDA WARRIORS AND THE GOVERNMENT'S JOINT WAR POWERS, OUR "FEDERAL SOVEREIGNTY," INCLUDE POWER TO DETAIN STATE ENEMIES

A) THE AUMF AUTHORIZES DETENTION OF AL QAEDA WARRIORS AS ENEMY COMBATANTS BECAUSE THE TEXT GRANTS THE SAME FORCE AGAINST NATIONAL & ORGANIZATIONAL FORCES, & *HAMDI* HAS HELD THE AUMF TO PERMIT DETENTION OF TALIBAN FORCES

The AUMF authorizes detention of al Qaeda operatives as enemy combatants for three reasons. First, the text and legislative history indicate Congress's approval of using military force specifically against al Qaeda operatives living peacefully in the U.S. Second, the AUMF text authorizes detention because it approves the same scope of force against national and organizational forces, and *Hamdi* already held that the AUMF permits detention of national forces, there the Taliban. Thus, the text compels also reading the use of force authorization to permit detention of organizational forces, here al Qaeda operatives. Third, treating al Qaeda operatives as enemy combatants in the war against al Qaeda is "necessary and appropriate" because it is an act of self-defense as the AUMF specifies, it comports with principles underlying the laws of war, and this construction best harmonizes with the statute's purpose of preventing another 9/11 attack.

1) *The AUMF Text and Legislative History Indicate Congress's Approval of Using Military Force Against al Qaeda*

In interpreting statutes, courts first look to the text itself. *Holloway v. United States*, 526 U.S. 1, 6 (1999). If the meaning of a provision is plain, it controls. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). The AUMF explicitly authorizes the Executive to use force against the "nations [and] organizations" responsible for the 9/11 attacks. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001). (emphasis added). The President has found al Qaeda responsible for the 9/11 attacks. Military Order of Nov. 13, 3 C.F.R. 918, § 1(a) (2001). Thus, Congress explicitly authorized use of force against the *organizations* responsible for 9/11, which include al Qaeda.

Courts also look to the legislative history and purposes that animate a statute to properly construe it. *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968). In authorizing military force against "organizations," Congress aimed "to prevent any future [attack]" like 9/11 on U.S. soil. AUMF § 2. Al Qaeda designed and executed 9/11, the event motivating this provision. See Military Order, *supra*. Thus, Congress's purpose, in context, shows that it must have meant to include al Qaeda in approving use of force against "organizations."

Further, Congress must have had in mind, *inter alia*, use of force against al Qaeda operatives living lawfully and peacefully within U.S. borders. Congress explicitly had in mind those "organizations" and "persons" "responsible for the [9/11] attacks." AUMF, 115 Stat. 224. Al Qaeda was found responsible.

See Military Order, *supra*. The al Qaeda operatives who executed 9/11 entered the U.S. lawfully for ostensibly peaceful purposes, just like Ahmed. *Holy Warriors Escalate an Old War on a New Front*, N. Y. Times, Sept. 16, 2001, available at www.nytimes.com. These agents never fought U.S. forces on any battlefield. See *id.* Congress passed the AUMF in response to this al Qaeda attack *explicitly* "to prevent any [similar] future [attack]" on U.S. soil. AUMF § 2. Therefore, Congress must have meant to extend use of force against al Qaeda operatives like the 9/11 hijackers who live lawfully in the U.S. before launching their attacks.

Ahmed is similarly situated to the 9/11 hijackers against whom Congress authorized use of force. Like them, al Qaeda ordered him to secure legal entry to the United States to act as a sleeper agent. R. at 47. Ahmed reportedly trained at Osama bin Laden's terrorist training camp for 18 months and met personally with bin Laden and other high-level al Qaeda leaders. *Id.*

Further, like the 9/11 hijackers, al Qaeda reportedly ordered Ahmed to research and execute a massive terrorist attack in the U.S. *Id.* Ahmed apparently complied with this order, as he appeared to be actively planning terrorist attacks at the time of his arrest. *Id.* Evidence showed that Ahmed was researching chemical weapons of mass destruction and furthering a plan to commit massive Social Security fraud. *Id.* Evidence also suggested that he was in contact with high-level al Qaeda officials repeatedly after entering the U.S. *Id.* Further, evidence that Ahmed was in failing status at his university for consistent absenteeism corroborates the government's evidence that Ahmed's

legal reason for entering the U.S. was merely pretextual. *Id.* This evidence shows that Ahmed acted as an al Qaeda agent intending to further al Qaeda's war-like aims.²

2) The Text Indicates that Congress Authorized Equally Broad Use of Force Against Nations and Organizations and Hamdi Held this Grant to Include Detention

Also, the AUMF's text indicates that Congress authorized equally broad use of force against nations and organizations. The text issues the *same* grant of force to the Executive to use against *both* nations *and* organizations. Thus, the text authorizes the same kinds of force against both national and organizational combatants. Additionally, by authorizing "*all* necessary and appropriate" force against these entities to prevent "*any* future acts of international terrorism," Congress granted the President broad power to use military force. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). The Executive has found both al Qaeda and the Taliban responsible for 9/11. President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001), *available at* <http://www.september11news.com/PresidentBushSpeech.htm>.

² Recognizing that the AUMF authorizes force against al Qaeda operatives like Ahmed would in no way imply that Congress also authorized force against unsuspecting donors of Afghan charities linked to al Qaeda or mere members of groups that have used violence. Ahmed, unlike an unsuspecting donor who contributes to a charity of a legitimate cause that secretly funnels some funding to terrorist organizations, has *intentionally* contributed to a *known* future terrorist plot. Further, Ahmed has associated himself with not just any terrorist organization, but with the network that planned the 9/11 attacks. Finally, Ahmed has not merely "joined" al Qaeda, but has taken steps to further its war-like hostile ends. Al Qaeda agents like Ahmed, unlike these others, are precisely the individuals that Congress targeted in authorizing the Executive to use military force to prevent a future terrorist attack by 9/11's authors. Thus, the AUMF authorizes the President to use force against al Qaeda operatives in the U.S. or abroad, including Ahmed.

Further, this Court has already held that the AUMF's grant authorizes detention of Taliban fighters as enemy combatants. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). Since the text nowhere explicitly grants the Executive broader power to use force against nations than against organizations, the text and this Court's holding in *Hamdi* compel extending this grant to authorize detention of al Qaeda fighters as enemy combatants.

Finally, the AUMF's authorization governs, not the subsequent Patriot Act provisions. When a court can interpret two statutes as compatible, as here, it should read them as complementary. *FCC v. Nextwave Personal Commc'ns, Inc.*, 537 U.S. 293, 304 (2003). If Congress has passed two provisions, one more specific than the other, the Court should only read the more-specific provision as limiting the more-general if the statutes cannot be reasonably construed as regulating different subject matter. *See Al-Marri v. Pucciarelli*, 534 F.3d 213, 288 (4th Cir. 2008) (Williams, C.J., concurring in relevant part).

The AUMF conditions the Executive's military powers as Commander in Chief. *Id.* In contrast, the Patriot Act qualifies the President's Article II, § 3 power over *internal affairs* to "take Care that the Laws be faithfully executed." *Id.* It concerns the Executive's domestic police power, providing law enforcement additional tools to prevent terrorism generally, rather than qualifying the Executive's power to militarily respond to 9/11. *Id.* at 301-02 (Wilkinson, J. concurring in relevant part). Thus, the Patriot Act only regulates detention of individuals determined *not* to be enemy combatants. In contrast, the AUMF

authorizes detention *only* for enemy combatants. Therefore, the Patriot Act and AUMF apply to different kinds of individuals. The AUMF controls here since it alone specifically addresses *military* detention in response to 9/11, and this text authorizes detention of al Qaeda fighters like Ahmed as enemy combatants.

The Court should especially read these statutes as compatible where, as here, this construction better comports with Congress's intent. *See Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968). Since al Qaeda operatives residing in the U.S. are explicitly enemy operatives against whom the AUMF is directed, *see supra*, Part I.A.1., the Court should not read the Patriot Act to abrogate the AUMF's authorization of military force against these agents absent an explicit abrogation of the AUMF in the Patriot Act. Congress made no such abrogation.

3) Detaining al Qaeda Operatives Is a "Necessary and Appropriate" Use of Force

Treating al Qaeda operatives as enemy combatants in the war against al Qaeda, subject to detention, is "necessary and appropriate" for two independently sufficient reasons. First, it is an act of self-defense as the AUMF specifies. Second, it comports with principles underlying the laws of war. Under either standard, the Court should read "necessary and appropriate" as permitting detention of al Qaeda agents like Ahmed because this construction best harmonizes with the statute's purpose of preventing another 9/11 attack.

a. *The AUMF Text & Purposes Indicate that Detaining al Qaeda Operatives Is "Necessary and Appropriate" to Defend Against Future al Qaeda Attacks*

In the war against al Qaeda, it is "necessary and appropriate" for the Executive to detain known al Qaeda operatives planning future terrorist attacks. Courts should look to the statute as a whole in clarifying the meaning of textual phrases. *United Savings Ass'n v. Timbers of Inwood Forest Ass'n*, 484 U.S. 365, 371 (1988). Congress used the phrase "necessary and appropriate" twice in the AUMF. In its first invocation, Congress described Executive use of force as "necessary and appropriate" *where* it is an exercise of self-defense against terrorist attacks like 9/11. 115 Stat. 224. This indicates that insofar as the Executive's use of force against al Qaeda constitutes an exercise of self-defense against a future terrorist attack, it is "necessary and appropriate."

So interpreted, detention of Ahmed, an al Qaeda warrior, is "necessary and appropriate" to defend against future terrorist attacks on U.S. soil. Ahmed trained in an al Qaeda terrorist training camp for 18 months and came to the U.S. as a sleeper agent on a martyr mission. R. at 47. Computer evidence, phone records, and his failing status at the university corroborate the allegation that Ahmed remains an active al Qaeda agent. *Id.* at 47-48. On these facts alone, detaining Ahmed is necessary and appropriate to prevent a future terrorist attack on U.S. soil. Further, Ahmed has communicated repeatedly with top al Qaeda officials, *id.*, and the President has found that Ahmed possesses intelligence that would aid U.S. efforts to prevent another al

Qaeda attack. *Id.* at 7. Thus, detaining Ahmed is "necessary and appropriate" as it will help defend against a future attack by helping the government learn crucial information in catching al Qaeda leaders and learning of other plots.

b. Law-of-War Principles Comport with Treating Ahmed as an Enemy Combatant Subject to Detention

Alternatively, detaining al Qaeda operatives like Ahmed is also "necessary and appropriate" under the laws of war. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 516, 518 (2004), the Court applied the laws of war to find detention of enemy combatants a necessary incident of war. Thus, insofar as detention of al Qaeda detainees *does not violate* the laws of war, the AUMF authorizes it. Notably, the *Hamdi* Court in no way intended to limit the scope of the category of enemy combatants, instead leaving further elaboration for future cases. *Id.* at 522 n.1.

Law-of-war principles support including Ahmed in the category of enemy combatants that the Executive may detain during the war against al Qaeda for two reasons. First, law-of-war principles have consistently accommodated the changing face of warfare. Second, al Qaeda, which operates much like a state, presents an unparalleled threat to U.S. national security that cannot be addressed by declaring war against any set of nations.

The law of war has consistently accommodated the changing face of warfare to serve its core principles. For instance, the laws of war historically only applied when nations declared war against each other. William Winthrop, *Military Law and Precedents* 668 (2d ed., Arno Press, 1979) (1920); *see also Hamdan v.*

Rumsfeld, 548 U.S. 557, 597 (2006) (describing Winthrop as the "Blackstone of Military Law"). However, the U.N. Charter now also applies to armed conflicts short of a declared war, including an armed attack, a threat to peace, or a use of force. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 320 (4th Cir. 2008) (Wilkinson, J. concurring in relevant part). Also, the laws of war have adapted to advances in war weaponry by amending the list of legitimate and illegitimate weapons. Winthrop, *supra*, at 784. Thus, the law of war has accommodated changes in international relations, changes akin to the novel use of weapons of mass destruction by politically motivated terrorists.

A main principle underlying the laws of war is to limit proper military targets to those persons who actually pose a military threat by legalizing force only against "enemy combatants." *Al-Marri*, 534 F.3d at 315. Traditionally, after one state declares war against another, all residents of the target nation become enemies. *Lamar v. Browne*, 92 U.S. 187, 194 (1875).

Further, in determining which individuals constitute "combatants," the laws of war distinguish between an enemy's armed forces versus peaceful civilian populations in an enemy state. *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942). To be considered a "combatant," an individual need not wear a uniform or be on a battlefield. *See, e.g., id.* at 38. Even civilians may become "enemy combatants" if they take a direct part in

hostilities, for instance by firing weapons at one of the warring forces. *Al-Marri*, 534 F.3d at 318-18 & n.7.³

Treating al Qaeda fighters as enemy combatants comports with the laws of war, properly adapted to al Qaeda's novel, unparalleled threat to national security. Al Qaeda's operatives "pose a military threat" to the U.S. and thus conform to the principle underlying the "enemy combatant" category. *Al-Marri*, 534 F.3d at 315. Al Qaeda manages a fighting force comparable to a nation-state. The entity has declared war on the U.S., deploys international warriors, employs weapons of mass destruction, and uses force to influence the foreign policies of enemy-nations. Stephen Engelberg, *One Man and a Global Web of Violence*, N.Y. Times, Jan. 14, 2001, available at www.nytimes.com. In these traits al Qaeda is akin to a state army. As al Qaeda fights to further a political agenda, it is unlike criminal enterprises, which pursue private ends. Further, the U.S. has declared war on al Qaeda. Al Qaeda is thus unlike most other dissident groups. As al Qaeda partakes of state-like behaviors, it should also be subject to international limits on state war-like actions. Thus, as a hostile enemy it should be treated as an enemy of war.

³ It matters not that the Court has classified the war with al Qaeda as a non-international conflict, for which enemy combatant status has not yet been recognized. See *Hamdan*, 548 U.S. at 630; Int'l Comm. of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, at 1, 3 (July 21, 2005), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705?opendocument>. Since the laws of war do not explicitly deny the applicability of enemy combatant status to conflicts like the war with al Qaeda, Congress is free to update the laws of war in this necessary way. *Id.*; see also Gabor Rona, *An Appraisal of US Practice Relating to "Enemy Combatants,"* 10 Y.B of Int'l Humanitarian L. 232, 241 (2007) (noting that IHL should defer to national law on whether nations may detain civilian combatants as enemy combatants).

Further, "law must reflect the actual nature of modern warfare." *Id.* at 293. Al Qaeda's unparalleled military threat to U.S. national security cannot be addressed by declaring war against any set of nations because it is a mobile network. Also, the Executive needs the power to detain al Qaeda agents in order to secure intelligence about how this stealth network operates and to prevent such agents from communicating with confederates in order to further plans of attack. *See Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005). The laws of war should not be construed as "so bound in obsolescence" that they cripple a nation's ability to address new national security threats. *Al-Marri*, 534 F.3d at 321. Notably, other courts have recognized al Qaeda as an entity with which the U.S. is at war. *E.g. id.* at 216, 253-54, 259; *Padilla*, 423 F.3d at 389.

Here, Ahmed has acted as a combatant fighting for the al Qaeda enemy. Ahmed has consciously allied himself with al Qaeda's military mission. *See supra* Part I.A.1. While his hostile activities did not take place on a battlefield or in uniform, nor were such factors present in *Quirin*. Ahmed has identified with the military arm of the enemy and thus stands akin to a member of an enemy nation that has prepared for hostilities. *Cf. Lamar v. Browne*, 92 U.S. 187, 194 (1875). Therefore, treating Ahmed as an "enemy combatant" comports with the laws of war's principles and its tradition of adaptation.

Finally, in choosing how to construe the "necessary and appropriate" prong, the Court should adopt the reading that "best harmonizes" the text with the statute's historical context and

purposes. *United States v. Hartwell*, 73 U.S. 385, 396 (1868); 2A Norman J. Singer and J.D. Shambie Singer, *Sutherland Statutory Construction* § 46.5 (7th ed. 2007). Plausibly, one could conclude that the laws of war have not yet been explicitly held to encompass al Qaeda warriors as enemy combatants, and thus the Executive may not detain them. However, that reading of the text would mean that, under the AUMF, the Executive could not have detained, before September 11th, the very 9/11 hijackers that motivated the AUMF, or even Osama bin Laden. That reading would contravene Congress's purpose in enacting the AUMF: to prevent another 9/11 attack. Therefore, the Court should read the "necessary and appropriate" clause to permit detention of al Qaeda agents residing in the U.S. like Ahmed.

B) THE COMBINED CONSTITUTIONAL WAR POWERS OF CONGRESS AND THE EXECUTIVE INCLUDE POWER TO DETAIN AL QAEDA OPERATIVES AS ENEMY COMBATANTS

The Constitution empowers Congress and the President, at the very least together, to declare war on an international terrorist entity with a military arm that attacked the U.S. The Constitution grants broad powers to the President and Congress over foreign affairs, as these powers constitute the whole of the nation's "federal sovereignty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring). The text makes the President Commander in Chief of the military, U.S. Constit. art. II, § 2, and Chief Executive. *Id.* art. II, § 1. It further grants Congress power to declare war, to make rules for the military, and to make laws necessary and proper for carrying out these powers. *Id.* art. I, § 8. These broad grants of power,

our "federal sovereignty" personified, empower Congress to declare war against al Qaeda, an entity that deploys weapons of mass destruction against our countrymen to influence our foreign policies. They too empower the government to militarily detain al Qaeda agents in the U.S. planning to launch attacks on U.S. soil.

While this detention finds ample support in the Constitution's broad grants of power over foreign affairs, it also enjoys a strong presumption of validity under this Court's leading war powers precedent, *Youngstown*, 343 U.S. 579. In his famous concurrence, Justice Jackson laid out the framework for assessing the constitutionality of Executive foreign affairs actions, especially domestic actions: when the President acts pursuant to congressional authorization, his authority is at its maximum. *Id.* at 636 (Jackson, J., concurring). Jackson reasoned that at such times, the Executive's actions "personify the federal sovereignty." *Id.* Thus, foreign affairs actions executed by the President and authorized by Congress are "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Id.* at 637. The burden of persuasion rests "heavily" upon anyone who challenges such action. *Id.*

Here, the Executive acted pursuant to Congress's use of force authorization against al Qaeda agents, as al Qaeda is the organization responsible for 9/11. This detention therefore enjoys presumptive constitutionality. The detention particularly enjoys presumptive constitutionality because the Court has already recognized that the Constitution's joint War Powers

include the power to detain enemy combatants. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).⁴

In light of *Youngstown*, any reliance on *Milligan* is misplaced here. First, Congress had not authorized force against the group to which Milligan belonged, the Sons of Liberty. See *Ex Parte Milligan*, 71 U.S. 2, 6 (1866). Since President Lincoln acted alone, the detention in *Milligan* did not enjoy presumptive constitutionality. In contrast, Congress has authorized force against Ahmed's organization, al Qaeda. Also, *Milligan* applies only to civilians, not to enemy combatants. *Ex Parte Quirin*, 317 U.S. 1, 45 (1942). In contrast, as explained above, Ahmed is an enemy combatant, thereby implicating the government's War Powers.

Further, the Executive's powers here, in the context of the hostilities giving rise to the AUMF, do not present the specter of temporally unlimited detention. Just as with a traditional war, peace could be determined by when Congress or the President issues a proclamation of peace with respect to al Qaeda. See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919) (recognizing that war can be ended by a legislative "proclamation of peace"); *The Protector*, 79 U.S. 700, 702 (1871) (referring to presidential proclamations as establishing peace). Thus, detention of al Qaeda combatants no more presents the specter of unlimited detention than does a traditional war.

⁴ Further, treating al Qaeda as an enemy of the U.S. whose combatant forces are subject to detention does not imply that the Constitution extends the same power for the Executive to detain any member of any terrorist organization. Al Qaeda alone has been declared by Congress as an enemy posing a threat to U.S. national security. Thus, only detention of al Qaeda operatives enjoys the *Youngstown* presumption of constitutionality.

Finally, for the Court to hold that Congress and the Executive together lack constitutional power to militarily detain al Qaeda combatants on U.S. soil would permanently cripple the nation in protecting our national security. In the 9/11 attacks, al Qaeda's agents demolished two of the nation's highest skyscrapers and slaughtered thousands of innocent civilians. Lest one believe this is a mere threat of the past, al Qaeda's forces continue to plan further domestic attacks. *See, e.g., Al Baker, Authorities on Alert After Report of Al Qaeda Plot*, N.Y. Times, Nov. 26, 2008, available at www.nytimes.com. These national security threats endanger the freedom of our citizens. In empowering the democratically-elected branches to protect our national security by detaining warriors of enemy networks on U.S. soil, our Constitution guards our nation's cherished liberties.

II) THE COURT AFFORDED AHMED SUFFICIENT PROCESS TO CHALLENGE HIS ENEMY COMBATANT STATUS

A) THE DISTRICT COURT'S PROCESS WAS SUFFICIENT BECAUSE IT WAS "PRUDENT AND INCREMENTAL" AND PROVIDED MORE THAN THE MINIMUM PROCESS REQUIRED BY *HAMDI*
The Twelfth Circuit's decision as to due process must be reversed because the procedure created by the district court provided sufficient process. Under the Due Process Clause, 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 decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 (2004). Elaborating on the minimum amount of due process required, the *Hamdi* Court recognized that in some cases, "a presumption in favor of the Government's evidence" would comport with the Due Process Clause. *Id.* at 534.

The Court urged district courts to "proceed with . . . caution" in enemy combatant cases and to engage in a "factfinding process that is both prudent and incremental." *Id.* at 538-39. The process provided by the district court was valid because the court proceeded in a "prudent and incremental" fashion and provided significantly more process than minimum requirements under *Hamdi*.

In light of the caution urged by the Court, the district court created a "prudent and incremental" process to ensure that Ahmed received due process. The district court first referred the matter to a magistrate judge to determine the appropriate amount of process due Ahmed. R. at 9. Ahmed had the opportunity to argue for a greater or lesser level of process before the magistrate judge. *Id.* The magistrate judge then crafted a process for Ahmed's case that was above the minimum level described in *Hamdi*. Under the process designed by the magistrate judge, Ahmed was to receive "notice of the factual basis of his detention" supported by "credible evidence" identifying him as an enemy combatant. *Id.* The burden would then shift to Ahmed to rebut that evidence with "more persuasive evidence." *Id.*

The magistrate found that the Murphy Declaration provided adequate notice and met the standard of "credible evidence," thus shifting the burden to Ahmed to rebut the Government's claims. *Id.* Although Ahmed has argued that this burden-shifting scheme places too much of a burden on him, R. at 10, the process comports with *Hamdi*. 542 U.S. at 534 (noting "once the Government puts forth credible evidence" that the defendant is an enemy combatant, "the onus could shift to the petitioner to rebut that

evidence"). And it comports with this Court's precedent in habeas proceedings, in which the "habeas petitioner generally bears the burden of proof." *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995).

Not only was the district court's procedure "prudent and incremental," it provided Ahmed considerably greater process than the minimum standard set forth in *Hamdi*. First, Ahmed had the opportunity to shape the process he would receive when he argued before the magistrate judge. Second, the magistrate judge did not afford the government's evidence any presumption of credibility as permitted by *Hamdi*. And third, the Murphy Declaration is far more specific and offers much more information than the Mobbs declaration in *Hamdi*, thus providing Ahmed a greater opportunity to rebut the facts underlying his detention. For example, the Mobbs Declaration contains only nine paragraphs, only two of which (¶¶ 3-4) concern Hamdi's actions. Mobbs Decl., available at http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbs_hamdi.html. The other paragraphs in the Mobbs Declaration concern Mobbs' qualifications (¶¶ 1-2), the prisons to which Hamdi was transferred (¶¶ 7-8), and interviews with Hamdi (¶¶ 5-6, 9). *Id.* This stands in stark contrast to the specificity of the nineteen paragraphs contained in the Murphy Declaration, which describe Ahmed's training as a terrorist and relationships with al Qaeda (¶¶ 5-11), the analysis of his computer (¶¶ 12-15), and his possession of Social Security card numbers (¶¶ 17-18), among other things. R. at 47-48.

In light of the district court's "prudent and incremental" process that provided Ahmed more than the minimum requirements of

Hamdi, three of the four judges sitting *en banc* below to consider the due process issue concluded that Ahmed received sufficient process. R. at 41 (Morrison, C. J., concurring in relevant part, joined by Baker and Chen, J.J.). Because the district court complied with the Supreme Court's warnings to proceed in a "prudent and incremental" manner, and because Ahmed received considerably greater process than the minimum standard set forth in *Hamdi*, the Court must reverse the Twelfth Circuit and find that Ahmed received sufficient process.

B) AHMED FORFEITED ANY RIGHT TO FURTHER PROCESS BY REFUSING TO PARTICIPATE IN THE CONSTITUTIONALLY VALID PROCEDURE CREATED BY THE DISTRICT COURT

Further, Ahmed forfeited any right to further process by refusing to comply with the district court's due process procedure, a procedure that both followed *Hamdi's* guidelines and provided Ahmed a greater level of process than the minimum constitutional requirements. *See supra* Part II.A. While it is a question of first impression whether an enemy combatant can lose his right to further process by refusing to engage in a constitutionally valid procedure, there is considerable Supreme Court precedent supporting the principle that a habeas petitioner can lose his right to contest his detention by failing to comply with procedures in lower courts.

In *Francis v. Henderson*, the Court held that because a defendant had failed to object to the composition of the indicting grand jury within the time limits required by state law, he could not then raise that objection during habeas review. 425 U.S. 536, 542 (1976). The Court found that in some cases,

preserving the "orderly administration of criminal justice" requires a court "to forgo the exercise of its habeas corpus power." *Id.* at 539; accord *Davis v. United States*, 411 U.S. 233, 242 (1973).

It is true that, unlike Ahmed, the defendants in both *Francis*, 425 U.S. at 536, and *Davis*, 411 U.S. at 234, had full criminal trials before bringing their habeas petitions. But allowing Ahmed to circumvent a process that complied both with *Hamdi* and the Constitution raises the same threat to the "orderly administration" of justice faced in those cases. Ahmed did not "offer any evidence to rebut the Murphy Declaration," instead arguing that the procedures "did not provide him with a meaningful opportunity to contest his enemy combatant status." R. at 9-10. His choice to ignore the district court's process and then claim insufficiency, without even having made the effort to comply with the process and test its adequacy, shows grave disrespect for the district court's authority.

Ahmed's claim of insufficiency rather than complying with the district court's process is not only inappropriate, it is contradicted by the facts of this case. The court clearly provided Ahmed a "meaningful opportunity" to contest his status. Ahmed had sixty days in which to rebut the Murphy Declaration, R. at 9, and many of the facts underlying his detention were within his personal knowledge. For example, Ahmed had ample opportunity to deny ownership of his laptop computer, *id.* at 48, to deny his presence at a terrorist training camp between 1996 and 1998, *id.* at 47, or even to correct his school attendance record. *Id.* at 47.

Thus, the district court's process afforded Ahmed a meaningful opportunity to contest his status, making his refusal to participate all the more inappropriate.

The Twelfth Circuit's solution to give Ahmed more process would perversely reward him for flaunting the district court's authority. And it would open the doors for every enemy combatant to challenge a district court's process instead of first complying with it, undermining the "orderly administration" of justice. Detainees should not be provided two opportunities for a hearing where one would suffice. If failure to comply with the time limits of a procedural rule can result in the loss of a defense at habeas review, certainly the intentional refusal to participate in one's defense should have the same effect. Both the magistrate judge and the district court that initially considered Ahmed's case came to this very conclusion, rejecting his claim "[b]ased on Ahmed's refusal to present evidence in his defense." R. at 10. Simply put, it would be wasteful and sanction disrespect for the law to reward Ahmed's behavior.

Because first, the Supreme Court has denied defendants meaningful aspects of their defenses in habeas proceedings for failure to comply with procedures in the trial court, second, Ahmed had ample opportunity to rebut the facts underlying his detention but refused to do so, and third, providing Ahmed with more process would reward him for flaunting the district court's power and undermine the "orderly administration" of justice, the Twelfth Circuit's decision must be reversed.

C) THE TWELFTH CIRCUIT ERRED BY MISAPPLYING BOTH THE FIRST AND SECOND STEPS OF THE *MATTHEWS V. ELDRIDGE* BALANCING TEST

As applied in *Hamdi*, the *Matthews* analysis to determine what level of process is due to a particular enemy combatant involves a two-part test. First, the court must weigh the government's interest against the individual's interest. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). Second, the court must consider "the risk of an erroneous deprivation" of the individual's interest and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* (quoting *Matthews v. Eldridge*, 424 U.S. 319, 325 (1976)). In analyzing the district court's process, the Twelfth Circuit erroneously found the process insufficient because it misapplied the *Matthews* test as follows: First, the Twelfth Circuit undervalued the government's interest in national security; Second, it ignored the government's interest in Ahmed as a source of intelligence; Third, it miscalculated the risk of erroneous deprivation in light of the fact that, unlike *Hamdi*, Ahmed was detained in the United States.

The Supreme Court has long recognized that, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). The Court has "repeatedly held" that this interest can "in appropriate circumstances, outweigh an individual's liberty interest." *U.S. v. Salerno*, 481 U.S. 739, 748 (1987). The Twelfth Circuit's first error was to ignore this history and undervalue the government's overwhelming interest in national security.

In considering the government's interest, the Twelfth Circuit described it merely as, "a 'weighty and sensitive' interest in protecting American citizens." R. at 25 (quoting *Hamdi*, 542 U.S. at 530-31). Compared to what the court described as Ahmed's "most elemental of liberty interests," it is clear the court inappropriately gave greater weight to Ahmed's interest in this case. R. at 25 (quoting *Hamdi*, 542 U.S. at 529). If the Twelfth Circuit had properly weighed the Government's interest in this case, it would have concluded that the Government's interest outweighed Ahmed's, not the other way around.

The Twelfth Circuit further erred by creating a new process that would improperly nullify the Government's valid interest in Ahmed as a source of national security intelligence. The Supreme Court recently acknowledged the Government's strong interest in intelligence gathering when it wrote that "the Government has a legitimate interest in protecting sources and methods of intelligence gathering" further urging district court to "accommodate this interest to the greatest extent possible." *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008).

The President has determined that Ahmed "possesses intelligence that would aid U.S. efforts to prevent attacks by al Qaeda." R. at 8. Yet despite this determination and the Court's history of giving great weight to the Government's interest in intelligence gathering, the Twelfth Circuit created out of whole cloth a process that would eliminate the Government's ability to seek further intelligence from Ahmed. Without any direct support from this Court's holding in *Hamdi*, the Twelfth Circuit's

decision requires the Government to prove that its evidence is the "most reliable evidence reasonably available" against Ahmed. R. at 24. This process would eliminate the Government's ability to further question Ahmed by requiring the Government in open court to admit to Ahmed both the sources and potential weak points of its evidence against him. This would make future questioning of Ahmed futile, and it would likely provide sensitive national security information to an enemy combatant. After such a broad disclosure, it is difficult to see how any further questioning would yield reliable intelligence.

Finally, the Twelfth Circuit erred in its *Matthews* analysis because it failed to consider the decreased risk of erroneous deprivation when an enemy combatant is detained within the United States as opposed to an active war setting, as was the case for Hamdi. The risk of erroneous deprivation can arise from two sources. First, there is a risk that the court will rely on insufficient evidence and wrongly classify a detainee as an enemy combatant even though he does not meet the standard. Second, there is a risk that incriminating evidence that inculcates some person will be accidentally mismatched with the detainee rather than the person actually responsible.

This Court made these two sources of potential error clear in *Wilkinson v. Austin*, when it held that Ohio's new policy for confining inmates to supermax prisons complied with due process because it provided, "safeguards against the inmate's being *mistaken for another or singled out for insufficient reason.*" 545 U.S. 209, 226 (2005) (emphasis added). The risk of erroneous

deprivation means the risk that the evidence will not suffice to warrant a deprivation, but it clearly also means the risk that the wrong evidence will be matched to the detainee and he will be made to answer for facts not rightly attributed to him.

The Twelfth Circuit wrongly ignored the second of the two risks. In considering the risk of erroneous deprivation, the court reasoned that the evidence against Ahmed would be more easily obtainable than that against Hamdi because it was "not likely 'buried under the rubble of war,' but contained in the records of the civilian officials that investigated him." R. at 27 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004)). The Twelfth Circuit was correct to consider the possibility that further evidence might help it to reach the correct conclusion, but it wrongly ignored the fact that because Ahmed was detained in the United States, it is much less likely than in *Hamdi* that the wrong evidence will be introduced against him. On the battlefield, it can be impossible to know who carried which weapon or fired the first shot, or even to distinguish a civilian from an enemy. But there is little doubt that the evidence collected against Ahmed is properly attributed to him. Indeed, he has not yet even bothered to deny ownership of the computer or the Social Security numbers discovered in his possession. *Id.* at 47-48.

The Twelfth Circuit's *Matthews* analysis was flawed because it undervalued the government's powerful interest in national security, it created a process that would nullify the Government's interest in Ahmed as a source of intelligence, and

it miscalculated the risk of erroneous deprivation. Accordingly, the Twelfth Circuit's decision on due process must be reversed.

D) THE TWELFTH CIRCUIT SHOULD HAVE SHOWN SOME DEFERENCE TO THE DISTRICT COURT'S DUE PROCESS PROCEDURE, WHICH IS A MIXED QUESTION OF LAW AND FACT

The Twelfth Circuit must be reversed because it showed insufficient deference to the trial court's due process procedure by reviewing the procedure *de novo*. As the Twelfth Circuit noted, its duty was to review legal conclusions *de novo* and findings of fact for "clear error." R. at 11 (citing *Colvin v. Taylor*, 324 F.3d 583, 586 (8th Cir. 2003)). The standard of review for mixed questions, applicable here, is more deferential than *de novo*.

This Court has noted "the want of a certain standard for distinguishing 'questions of law' from 'questions of fact.'" *Dobson v. Commissioner*, 320 U.S. 489, 501 (1943). Circuit courts have applied varying standards of review when confronted with mixed questions of law and fact, including the clear error standard. *See, e.g., Bertucci Contracting Corp. v. M/V Antwerpen*, 465 F.3d 254, 259 (5th Cir. 2006); *In re Extradition of Howard*, 996 F.2d 1320, 1328 (1st Cir. 1993). And this Court has indicated that a strict *de novo* standard of review might not be appropriate where factual inquiries are of "dominant importance." *Commissioner v. Duberstein*, 363 U.S. 278, 289 n. 11 (1960).

There can be little doubt that it is a pure question of law whether or not the process afforded Ahmed met the bare minimum constitutional requirements of notice and an opportunity to rebut the factual assertions underlying his detention before a neutral decisionmaker. But once that minimum standard has been met, it

becomes a mixed question of law and fact whether the procedure was appropriate to the facts in a particular case. For example, the Twelfth Circuit found that because Ahmed was detained in the U.S., due process required the Government to prove that its evidence was the "most reliable evidence." R. at 24. Whether that is the correct amount of process for Ahmed is a mixed question of due process law and the facts of his detention.

In *Hamdi*, the Court indicated the dominant importance of factual inquiries in due process decisions when it wrote that habeas petitioners must have "some opportunity to present and rebut facts" and that courts "retain some ability to vary the ways in which they do so as mandated by due process." *Hamdi v. Rumsfeld*, 542 U.S. 507, 526 (2004). It is clear from the process envisioned by the *Hamdi* Court that any due process decision must be inextricably interwoven with the facts of the particular case. In light of the factual dominance in crafting a due process procedure, a court's chosen procedure should be shown at least some deference as a mixed question of law and fact. As the district court's due process procedure is a mixed issue of law and fact, the Twelfth Circuit erred in reviewing it *de novo*.

CONCLUSION

The Court should AFFIRM the Twelfth Circuit's holding that the AUMF and the Constitution permit detention of Ahmed and REVERSE its holding that Ahmed did not receive due process.