12-3176, 12-3644

United States Court of Appeals
For the Second Circuit

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CHRISTOPHER HEDGES, Daniel Ellsberg, Jennifer Bolen, Noam Chomsky, Alexa O'Brien, US Day of Rage, Kai Wargalla, Hon. Birgitta Jonsdottir M.P.,

Plaintiffs-Appellees,

v.

BARACK OBAMA, individually and as representative of the United States of America, Leon Panetta, individually and in his capacity as the executive and representative of the Department of Defense,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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STATEMENT OF JURISDICTION

Jurisdiction below was pursuant to a federal question under 28 U.S.C. §1331. Appeal of the preliminary injunction is moot by entry of permanent injunction as to which jurisdiction lies as an appeal from a final judgment pursuant to 28 U.S.C. §1291.

STANDARD OF REVIEW

The decision emerges from a factual trial record and the standard of review is clearly erroneous**.**

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT NDAA §1021(B)(2) DIFFERS MATERIALLY FROM THE AUMF GIVING RISE TO A REASONABLY OBJECTIVE FEAR OF DETENTION NOT PRESENT UNDER THE EARLIER ENACTMENT.

The government's central defense to standing is that in the ten years since the 2001 Authorization for the Use of Military Force (AUMF) has been in force journalists and others like plaintiffs have not been detained under the military authorization, hence plaintiffs have no reasonable fear of detention under §1021(b)(2) that - in the government's view - merely re-codifies the AUMF. Gov't Bf. at 27.

Such argument was well understood by the district judge who encapsulated the government's argument in her opinion below:

> "[T]he Government argues…plaintiffs cannot have standing since § 1021 is simply a reaffirmation of the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (the "AUMF")--and since plaintiffs were never detained under the AUMF in the ten years since its passage, they cannot have a reasonable fear that they will be detained under § 1021(b)(2) now. The Court rejects that argument."

Decision at 9.

The government's challenge to plaintiffs' standing thus turns largely on whether §1021 is a mere reassertion of the AUMF or whether it contains new, material terms that add to and expand the AUMF's scope of coverage. As shown below, the trial court correctly concluded that "The Government's position that the AUMF and §1021(b)(2) are coextensive is wrong as a matter of fact and law." Decision at 34.

Comparing the text of the two enactments shows that the NDAA §1021(b)(2) and the AUMF are not co-extensive, as the district court concluded. Decision at 34-35. The AUMF states:

> 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.

AUMF § 2(a) (emphasis added). The italicized text shows that the AUMF authorizes detention only for the specific class of persons who aided, committed, planned or participated in a specific act, namely the September 11, 2001 terrorist

attacks "or [who] harbored such organizations or persons". *Id.*

Such limiting language led the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), to give the AUMF a "*narrow*" construction pertaining to a "*narrow* category" of detainees, authorizing military detention *only* where the detainee was "engaged in armed conflict against" U.S. forces. 542 U.S. at 526. *Hamdi* construed the AUMF to be limited to the "*narrow* circumstances" of preventing "a *combatant's* return to the field of battle." 542 U.S. at 519, 521 [emphasis added]:

> "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 armed conflict against the United States*' to justify his detention in the United States for the duration of the relevant conflict."

Hamdi v. Rumsfeld, 542 U.S. at 526 [emphasis added].

Hamdi holds that mere "support" for such groups is one of *two* required legs for AUMF detention, the *additional* element being that the detainee must have been "engaged in armed conflict against the United States." *id.* Conversely, §1021(b)(2) requires *only* that a detainee have "substantially supported" al-Qaeda, the Taliban or "associated forces", omitting any requirement of combatancy or participation in "armed conflict". *Hamdi* had been in force for more than eight (8) years prior to adoption of the NDAA, its holding was known to Congress, *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 581 (1978), and

Congress's omission in §1021(b)(2) of the AUMF requirement that the detainee must have been "engaged in armed conflict against the United States", 542 U.S. at 526, must be seen as a legislative expansion of detention authority beyond the traditional contours of the AUMF. *Hamdi*, supra.

A parallel provision in the NDAA, §1022(a)(2)(B), *does* refer to detention of *combatants*, i.e., those who are a "member…or part of" al-Qaeda or "participated in the course of planning or carrying out an attack…against the United States…" See NDAA, §1022(a)(2)(B). However, §1021(b)(2) omits any such requirement. The distinction is not accidental – §1022(a)(2)(B) refers to the traditional combatant detainee, while §1021(b)(2) (at issue on this appeal) makes no reference to combatancy or membership in a hostile organization as a predicate for detention, thereby investing the government with detention power beyond what the Supreme Court held was permitted under the AUMF. See *Hamdi*, supra. As the district court recognized below, §1021(b)(2) is a "legislative…fix" to create a detention power outside of combatancy that had been rejected by the judiciary as being beyond the authority of the AUMF. Decision at 9.

At hearing on permanent injunction, the government conceded the NDAA departs from the AUMF's requirement that a detainee have been implicated in the 9/11 attacks or have harbored those who did:

> The Court: You would agree with me that 1021(b)(2) does not require that an individual have – I will quote the language – planned, authorized,

> committed or aided terrorist attacks that occurred on September 11, 2001?
>
> Mr. Torrance: The individual need not have done that. That's correct.
>
> The Court: Okay. And the individual need not have harbored such organizations or persons?
>
> Mr. Torrance: That's correct.

T. II at 106, 108-109. Based, in part, on this colloquy, the district court held that §1021(B)(2) authorizes "*for the first time*", the President to detain without reference to participation in the events of September 11, 2001, rendering "Section 1021…significantly different in scope and language from the AUMF". Decision at 44.

The government also acknowledged that for most of the life of AUMF it interpreted the AUMF to extend to those who "*directly* supported" al-Qaeda, the Taliban or their associates, rather than the new "substantially supported standard:

> The Court: … So, when did "*directly* support" come into the government's interpretation of the AUMF?
>
> Mr. Torrance: In the 2004 Department of Defense articulation of the detention standard that we referred to, it is in footnote 5 on page 5 of our current brief but it is in all our briefing before, I'm quoting from the D.C. Circuit case of Parhat for which an attorney is quoting the 2004 documents here, but the standard there is an individual who was part of or supporting Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners including any person who has committed a belligerent act or who has *directly* supported hostilities in aid of enemy armed forces.

Tr. II at 111. The government agreed that §1021(b)(2) changes this standard from

"directly supported" to "substantially supported":

> Mr. Torrance: So, [§1021(b)(2)] is essentially identical except for the word "substantially" in front of "support." Essentially identical to the March 2009 filing…
>
> * * *
>
> Mr. Torrance: …But, anyway, going back, just to going back to the 2004 standard, that's the first articulation of which I am aware that direct support comes into play.

Tr. II at 111.

As this colloquy shows, the government's March 2009 brief in *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009), using "*substantially* supported" to describe AUMF detention authority represented a change from the government's long-standing interpretation of its AUMF powers which, from 2004 through 2009, consisted of detention based on the "*directly* supported" standard. Tr. II at 111.

It is anomalous for the government to suggest that the AUMF has *always* included the power to detain based on the "*substantially* supported" standard when the government, throughout most of the life of the AUMF, limited its view of that power to "*directly* supported", as it acknowledged on the record.[1] "Directly supporting" and "substantially supporting" are different standards. *Obaydullah v. Obama*, 744 F. Supp. 2d 344, 349 (D.D.C. 2010) ("Fortunately, choosing between

[1]In any event, the court in that matter, *Hamlily* v. Obama, 616 F. Supp. 2d 63, 69 (D.D.C. 2009), rejected expansion of presidential authority under the AUMF, denying any power under the AUMF *or* "law of war" to detain based on *either* the "substantially supported" *or* "directly supported" standard.

these standards [“directly” vs. “substantially”] is not necessary to a ruling on the petition in this case.”)

NDAA §1021(b)(2) also expands the scope of detention from other closely-related statutes including the Military Commissions Act (MCA), 10 U.S.C. §948a(7), and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).

MCA defines offenses triable by military commission as those in which the detainee “has *purposefully* and *materially* supported *hostilities* against the United States or its coalition partners,…” 10 U.S.C. § 948a(7). In contrast, §1021(b)(2) contains no requirement that the detainee’s conduct have been “purposeful”, a distinction noted by the district court. Decision at 106-107 (“Notably, §1021(b)(2) does not require that the conduct which could subject an individual to detention be ‘knowing’ or ‘purposeful’”).

Section §1021(b)(2) differs from the MCA by omitting the requirement of “material” support and replacing it with the undefined “*substantially* supported” standard; “material support”, unlike NDAA’s “substantial support” standard, has a clear definitive structure in the closely-related AEDPA. See 18 U.S. C. §2339A(1).

MCA permits detention only for one who “*materially* supported *hostilities*…”, whereas §1021(b)(2) authorizes detention of a “covered person” for

having "substantially supported" "al-Qaeda, the Taliban or their associated forces" with no predicate that the detainee have supported actual "hostilities", a vast difference in legislative focus between the two statutes. NDAA thus expands the government's detention power from one who "*materially* supported *hostilities*" to mere "substantial support" for certain "groups", i.e., "al-Qaeda, the Taliban or their associated forces" - a statutory focus that eliminates the MCA's requirement of support of "hostilities as the predicate for detention and replaces it with a focus on associative interests. The trial judge noted the changes in legislative focus between the MCA and §1021(b)(2). Decision at 105-107.

As the statutory texts show, §1021(b)(2) broadens the trigger for detention authority from one who "*materiall*y supported *hostilities*" under the MCA, a non-controversial basis for custody, to one who "*substantially* supported *al-Qaeda, the Taliban or their associated forces*", thereby expanding detention authority in §1021(b)(2) to those who "substantially support" certain groups, with no requirement of support of "hostilities", a marked change from the MCA's focus on combatancy-based detention.

Congress, when creating §1021(b)(2) is presumed to have knowledge of closely-related statutes such as the MCA, see e.g. *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. at 581; *Lebron v. Rumsfeld*, 670 F.3d 540, 551-552 (4th Cir. 2012) (Congress "devoted extensive attention" to the MCA).

NDAA's omission of clear limiting terms that appear in the earlier MCA must be seen as changes in the fundamental law, a deliberate act of legislative expansion by Congress. As the trial judge noted, §1021(b)(2) allows "for the first time", an expansion of detention authority to include persons "unconnected to any battlefield or to the carrying of arms". Decision at 44.

As with the MCA, the differences between §1021(b)(2) and the AEDPA are extensive, replacing AEDPA's "material support" standard with the "substantially supported" standard. See 18 U.S.C. § 2339A and B. As with the MCA, AEDPA § 2339A(a) prohibits the "*knowing*" provision of material support or financing to a foreign terrorist organization, 18 U.S.C. §2339A(a), while NDAA §1021(b)(2) permits detention *without* any knowledge or intent requirement. Decision at 106-107. AEDPA defines "material support" in detail, see 18 U.S.C. §2339A(b)(1)(2)(3), whereas §1021(b)(2) leaves the term "*substantially* supported" completely undefined (and it is defined nowhere else in *any* federal statute). It was because of its definitions of "material support" that AEDPA was held constitutional in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). NDA §1021(b)(2) lacks any definition at all.

As noted by the trial court, Decision at 94-95 and n. 40, §1021 also omits AEDPA's "First Amendment saving clause", *id.* at 94, that bars detention or prosecution based on First Amendment activity. 19 U.S. C. § 2339B(i). NDAA

contains no savings clause exempting First Amendment activity, a further change between NDAA and prior legislation. Because of these changes, NDAA, when compared to the AEDPA and the MCA, must be seen as reflecting a legislative intent to invest the government under §1021(b)(2) with a substantially broader detention authority than under prior closely-related enactments.

In its merits brief, the government contends that the NDAA merely replicates the original executive branch "interpretation" of the AUMF. In reality, the NDAA goes far beyond President George W. Bush's original Executive Order, dated November 13, 2011, that first implemented the AUMF. The Executive Order states in Section 2(a):

> a) The term "individual subject to this order" shall mean any individual *who is not a United States citizen* with respect to whom I determine from time to time in writing that:
>
> (1) …,
>
> (i) *is or was a member of* the organization known as *al Qaida*;
>
> (ii) *has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor,…*; or
>
> (iii) *has knowingly harbored one or more individuals* described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order;

66 FR 57833 [emphasis added].

As the text plainly shows, the Executive Order, promulgated shortly after the passage of the AUMF and intended to implement the AUMF,[2] and serving as a better indicia of legislative intent than the Obama administration's briefing in *Hamlily* eight years *later*, differs materially from §1021(b)(2).

First, the Executive Order excludes U.S. citizens from the class of potential AUMF detainees while §1021(b)(2) contains no such exclusion. Congress's omission in §1021(b)(2) of the Executive Order's exclusion of U.S. citizens from the AUMF plainly shows that the AUMF and the NDAA are *not* coextensive *and* that Congress intended NDAA to have broader application. In addition, the Executive Order is cast only in terms that refer to combatants or participants in the 9/11 atttacks, while §1021(b)(2) is not limited to or predicted upon combatancy or actual participation in the terror attacks, a point the government conceded on the record. Tr. II at 106, 1080109; Decision at 43-44. Finally, nowhere in the Executive Order does the term "substantially supported" or even "supported" appear as a basis for triggering detention, as it does in §1021(b)(2).

These distinctions alone undermine the government's argument that §1021(b)(2) reflects the Executive's "longstanding" understanding of his detention authority under the AUMF.

[2] The Executive Order makes clear in its preamble that it is interpreting Presidential authority under the AUMF: "By the authority vested in me as President and as Commander in Chief…*including the Authorization for Use of Military Force Joint Resolution*…it is hereby ordered as follows:…" 66 FR 57833.

Based on this record, the district court correctly concluded that §1021(b)(2) differs materially in detention authority from: 1) the 2001 AUMF; 2) other closely-related statutes such as the MCA and the AEDPA; and 3) the interpretation of the Bush administration in its original Executive Order implementing the AUMF.

II. LITIGATION AND ADMINSTRATION PRACTICE UNDER THE AUMF DO NOT SUPPORT THE GOVERNMENT'S CLAIM THAT THE "SUBSTANTIALLY SUPPORTED" STANDARD HAS LONG BEEN UNDERSTOOD TO BE A PART OF THE AUMF

The government argues "there is *no doubt* that the Executive Branch *and* the courts have *long interpreted* the AUMF to include "substantially supported" as a basis for detention. Gov't Bf. at 33 [emphasis added]. These assertions are belied by the actual record of executive practices under the AUMF and the extensive case law that has developed.

The Bush administration – that had primary responsibility for implementing the AUMF for its first eight years - never adopted the "substantially supported" standard. For example, the 2001 Executive Order not only failed to use such interpretive standard but limited AUMF detention to those who were "members" or a "part" of hostile groups or actual combatants. 66 FR 57833.

At least three courts have noted that the change in adminstration has led to a change in interpretive approach in which the "combatancy" standard used by the Bush administration has given way to the more amorphous "support" standard urged by the Obama administration. See e.g. *Al-Adahi v. Obama*, 698 F. Supp. 2d

48 ("Since the change in administrations, the Government has abandoned Article II as a source of detention authority, and relies solely on the AUMF."); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 n.4 (D.D.C. 2009) (government has shifted under President Obama from a combatancy to a "support" standard); *Obaydullah v. Obama*, 744 F. Supp. 2d 344, 349 (D.D.C. 2010) ("In the aftermath of the change in administrations…the Government, for reasons not known to this Court, now eschews the use of the phrase "enemy combatant" to be replaced by "a showing of 'substantial support' to the Taliban or al Qaeda".)

Far from a "long interpreted" practice, Gov't Bf. at 33, the "substantially supported" framework is an innovation of the Obama administration at odds with the Bush administration's seven years of focus on combatancy as the trigger for detention. Such interpretation arose, *for the first time*, in the Obama administration's briefing March 2009 in *Hamlily* – nearly eight years *after* the AUMF was enacted – and was squarely rejected by *Hamlily*, the one court where it was ever directly raised; it was not appealed and the theory of support-based detention was later abandoned by the government in *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010).

No court has ever accepted such standard in place of actual combatancy. See e.g. *Gherebi v. Obama*, 609 F. Supp. 2d at 70-71 (applying "substantially supported" solely in cases of detainees "who were members of the enemy

organization's armed forces…at the time of their capture."); *Hatim v. Obama*, 2010 U.S. Dist. LEXIS 137, 11 (D.D.C. 2010) (noting that *Gherebi's* acceptance of the "substantially supported" standard "is not meant to encompass individuals outside the military command structure of an enemy organization"); *Mohammed v. Obama*, 704 F. Supp. 2d 1, 30 (D.D.C. 2009) (same).

The government offers no evidence that prior to its March 2009 *Hamlily* brief it had adopted a "substantially supported" standard for AUMF detention and cannot refute that the new standard represents a marked change in detention theory from the Bush adminstration's "combatancy" standard. Aside from the *Hamlily* brief, the only "evidence" offered by the government of a "long interpreted" executive branch practice embracing the "substantially supported" standard is the speech of Jeb Johnson, General Counsel of the Department of Defense, at Yale Law School in February 2012 quoting – not from some extrinsic source – but from the very same March 2009 brief in *Hamlily*.[3]

In sum, support for a "long interpreted", Gov't Bf. at 33, executive branch practice of a "substantially supported" detention authority is limited to the government's own 2009 *Hamlily* brief (rejected in that very court) and the DOD General Counsel's reference to that same brief in his Yale speech. Such circular reasoning is hardly proof of "a systematic, unbroken, executive practice, long

[3] http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/, n. 3.

pursued to the knowledge of the Congress and never before questioned." *Medellin v. Texas*, 552 U.S. 491, 531 (2008) citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952). Citation to a brief and a speech based on that brief do not establish "a well-understood and uniformly applied practice…that has virtually the force of a judicial construction." *Hoye v. City of Oakland*, 653 F.3d 835, 848 (9th Cir. 2011).

As Judge Forrest found, the "substantially supported" detention power in §1021(b)(2) is a late innovation by the current administration to expand the narrow contours of the AUMF. As the district judge noted, §1021(b)(2) appears to be

> "…a legislative attempt at an ex post facto "fix": to provide the President (in 2012) with broader detention authority than was provided in the AUMF in 2001 and to try to ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF. That attempt at a "fix" is obscured by language in the new statute (e.g., "reaffirmation") that makes it appear as if this broader detention authority had always been part of the original grant. It had not.

Decision at 9.

Through the long history of litigation under the AUMF the government's "substantially supported" standard (first raised in *Hamlily*, eight years after passage of the AUMF) has never received judicial sanction. In *Hamlily* the government argued that

> "The President also has the authority to detain persons who were part of, *or substantially supported, Taliban or al-Qaida forces or associated forces* that are engaged in hostilities against the United States or its coalition partners,

> including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."

Resp'ts', Mem. March 13, 2009, at 2, Misc. No. 08-442 (D.D.C.) (Doc. 462) [emphasis added].

Such trial balloon had a short life. *Hamlily* rejected outright the government's claim to the "substantially supported" standard under the AUMF *or* the "law of war":

> Detaining an individual who "substantially supports" such an organization, but is not part of it, is simply not authorized by the AUMF itself or by the law of war. Hence, the government's reliance on "substantial support" as a basis for detention independent of membership in the Taliban, al Qaeda or an associated force is rejected.

616 F. Supp. 2d at 75-76.

What *Hamlily* rejected is the very essence of what the government argued below: that detention authority under AUMF *or* "law of war" always and necessarily included detention of one who "*substantially supports* such an organization". *Id*. Were it true, the government's argument might bear some weight as to standing, but as shown above, *Hamlily*, the *only* court where the government directly presented the issue, squarely and unequivocally rejected the contention that the AUMF ever included such detention authority. In *Gherebi v. Obama*, 609 F. Supp.2d 43 (D.D.C. 2009), the same court pointedly refused to apply the "substantially supported" standard to persons coming under the protection of the U.S. Constitution, *Gherebi*, 609 F. Supp.2d at 55 n.7, a second

judicial rejection of the government's claim to broad detention power over U.S. civilians. Notably, *Gherebi* limited the "substantially supported" standard to cases involving membership in "the military command structure of an enemy organization". 609 F. Supp. 2d at 70.[4]

Other cases in the D.C. Circuit have applied only the "a part of" standard under the AUMF, meaning that the detainee was "a part of" al-Qaeda or the Taliban. See e.g., *Baroumi v. Obama*, 609 F.3d 416, 431 (D.C. Cir. 2010) (detainee was "*part of* an al-Qaida-associated force and… properly detained pursuant to the AUMF." [emphasis added]; *In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d 119 (D. D.C. 2010) (court noted government's claim to "substantially supporting" standard under AUMF but did not construe such claim as each plaintiff was a former Guantanamo detainee taken in a *combat* theater abroad.); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 209) (Chief Judge Lambert refuseing to accept the "substantially supported" framework under the AUMF and noting that *Gherebi* applied it "only" to members of the enemy force).

[4] Other decisions relied on by the government in the district court, such as *Mohammedou Ould Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010), and *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010), make it clear that these courts were construing the limited question of membership in al-Qaeda as the basis for detention authority under the AUMF, not the question of "substantial support".

Over the many years of litigation as to the scope of AUMF detention authority, the D.C. Circuit has distanced itself from any endorsement of the broader "substantially supported" standard under the AUMF.

In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), the court acknowledged the government's claim to the "substantially supporting" standard but did not apply it, holding instead that an Arab militia member arrested in Afghanistan "purposefully and *materially* supported" the Taliban by serving as a food vendor to Taliban camps.[5] 590 F.3d at 873. Thus, the "substantially supporting" standard was not construed by the *Al-Bihani* court that instead applied the "*material* support" standard.[6]

Having faced repeated judicial rejection of its broader detention theory, the government in *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010), actually "abandoned" the "substantially supporting" framework under the AUMF. In *Bensayah*, the government had persuaded the district court that an Algerian national arrested in Bosnia for conspiring to bomb the U.S. embassy could be

[5] Notably, *Al-Bihani* construed the standard in the context of "purposely" providing support, 590 F.3d at 873, implicating an intent requirement that is absent from the NDAA, one of the circumstances that led the district court to find that NDAA detention authority to be unconstitutional. Decision at 107.

[6] The D.C. Circuit has since made clear that its holding in *Al-Bihani* was limited to a finding that the detainee was a "part of" the Taliban or "associated forces". *Khan v. Obama*, 655 F.3d 20 23 (D.C. Cir. 2010), citing Al-Bihani ("We have held that the AUMF grants the President authority (inter alia) to detain individuals who are "*part of* forces associated with Al Qaeda or the Taliban.") [emphasis added].

detained under the AUMF because he "provided *support*" for al-Qaeda or the Taliban. On appeal, the Government abandoned this claim, acknowledging instead that detention authority under the AUMF "extends to the detention of individuals who are functionally *part of* al Qaeda." 610 F.3d at 720 [emphasis added]. Based on this change in position, the D.C. Circuit in *Bensayah* found that "the Government *abandoned* its theory that Bensayah's detention is lawful because he rendered *support* to al Qaeda." 610 F.3d at 722 [emphasis added].[7]

No decision since *Bensayah* has relied upon or applied the "substantially supporting" theory of AUMF detention. See *Alsabri v. Obama*, 2012 U.S. App. LEXIS 9006 (D.C. Cir. 2012); *Parhat v. Gates*, 532 F.3d 834, 837-38 (D.C. Cir. 2008)(noting the government's March 2009 briefing in passing but finding a Chinese national having fled an Afghan military camp was "an enemy *combatant*", not a "substantial" supporter); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1073-1074 (applying the a "*part of*" standard to those who "purposefully and materially support such forces in hostilities against U.S. Coalition partners.'"); accord *Almerfedi v. Obama*, 654 F.3d 1, n.2 (D.C. Cir. 2011); *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. cir. 2011) (recognizing that *Al-Bihani* extended to those who

[7] The government's approach to *Bensayah* is highly dispositive of the fact that the AUMF did *not* convey detention authority under the "substantially supporting" standard. To show that a detainee is "supporting" a terrorist group requires an easier burden of proof than to prove they are a "a *part* of" such an organization. The government in *Bensayah* would presumably not have abandoned the easier "support" standard if it believed such standard was cognizable under the AUMF.

"*materially* supported" the designated terror groups); *Uthman v. Obama*, 637 F.3d 400, n.2 (D.C. Cir. 2011) (same); *Esmail v. Obama*, 639 F.3d 1075, 1076 (D.C. cir. 2011) (same).

In sum, no court has ever applied the "substantially supported" standard under the AUMF. Accordingly, the government's contention that "the courts have *long interpreted* the AUMF to include 'substantially support' " as a detention standard, Gov't Bf. at 33, is without support.

Recently the D.C. Circuit rejected even "*material* support" as a basis for AUMF detention. In *Hamdan v. United States*, 2012 U.S. App. LEXIS 21385 (October 16, 2012), the D.C. Circuit held that the AUMF did not authorize prosecution for "material support" of terrorist groups. Holding that "[t]here is no international-law proscription of *material* support for terrorism", the D.C. Circuit held that the AUMF did not authorize prosecution by military commission under the "material support" standard. *Id.* at 31-32.

Hamdan effectively negates the government's claim that the AUMF had authorized detention based on a "support" standard. Since neither the law of war nor the AUMF provide for military detention under the *material* support standard, as the D.C. Circuit now holds, it follows logically that neither AUMF nor the law of war authorize detention based on the lesser and ill-defined "*substantially* supported" standard that now appears in the NDAA.

Legislative history of the AUMF also makes it clear that the AUMF did *not* authorize military detention of civilians on U.S. soil, as NDAA would now permit. *Padilla v. Rumsfeld*, 352 F.3d 695, 723, n.31 (2d cir. 2003) rev'd on other grounds *Rumsfeld v. Padilla*, 134 S. Ct. 2711 (2004). As this Court noted in *Padilla*, Congressional debates at the adoption of the AUMF show that even proponents complained it was too limited in scope and did not authorize the President to "attack, apprehend, and punish terrorists *whenever* it is in the best interests of America to do so". See e.g. [emphasis added]. "The debates [on the AUMF]", the Second Circuit noted in *Padilla*, are "at best equivocal on the President's powers *and never mention the issue of detention…they do not suggest that Congress authorized the detention of United States citizens captured on United States soil*." *Id.* [emphasis added]. The broader provisions of the NDAA §1021(b)(2), as Judge Forrest found, are a "legislative…fix" to bridge the gap.

Judge Forrest's detailed analysis, Decision at 32-45, that §1021(b)(2) is a substantively new enactment that embraces a detention standard not authorized under the AUMF is well supported by: 1) the trend of decisional law; 2) the prior patterns of executive usage; and 3) legislative history.[8] Accordingly, the

[8] Judge Forrest noted that it was unlikely that such a standard had *ever* had any widespread acceptance since the government, 11 years after the "substantially supporting" standard supposedly came into force, was unable at trial to offer any definition of the material terms of §1021(b). See Decision at 10-11 ("one would reasonably assume that if the AUMF was interpreted consistently with the language of § 1021(b)(2), by 2012 the Government would be able to clearly define its terms and scope. It cannot.")

government's position that plaintiffs lack standing because §1021(b)(2) is not a new enactment but a mere re-codification of the AUMF is without effective foundation.

III. BY AUTHORIZING INDEFINITE INCARCERATION OF "COVERED PERSONS", §1021(b)(2) INVOKES "PRIMARY CONDUCT" AND IS "REGULATORY, PROSCRIPTIVE OR COMPULSORY IN NATURE" UNDER THE HOLDING OF *LAIRD V. TATUM*, 408 U.S. 1 (1972)

Despite its license to indefinitely detain any person for "substantial support" for certain groups, the government contends that §1021(b)(2) does not "proscribe" any "primary conduct" and is not "regulatory, proscriptive, or compulsory in nature". Gov't Bf. at 36. But contrary to the government's argument, case law has long established that detention modalities in their many incarnations are both "compulsory and "regulatory" in nature. *United States v. Melendez-Carrion*, 790 F.2d 984, 1004 (2d cir 1986) (noting "compulsory" nature of detention of Japanese Americans); *Ha Tran v. Mukasey*, 515 F.3d 478 n.1 (5th Cir 2008) (detention of aliens is a "*regulatory* scheme"); see also Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325, 1343-44 (1991) (noting the "regulatory character" of detention statutes governing illegal aliens and enemy aliens, among others); Cf., *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008), J. Kennedy dissenting ("[D]etention" is defined by legal and nonlegal dictionaries alike as a "compulsory," "forced," or "punitive" containment.

Black's Law Dictionary 459 (7th ed. 1999) (compulsory); *American Heritage Dictionary* 494 (4th ed. 2000) (forced or punitive)").

This new contention by the government, raised for the first time on appeal, that §1021 is constitutional because it does not "impose an affirmative obligation…on plaintiffs," *id*., studiously ignores the authority the NDAA conveys to the military to take custody of "any person" who has "substantially supported" such groups or their associates. Authority to detain based on the acts of the detainee, rather than a rule burdening his procedural rights, unquestionably imposes a burden on the detainee's "primary conduct". Cf., *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 n.6 (2006), quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) ("Statutes…addressing *which* court shall have jurisdiction to entertain a particular cause of action…regulate the secondary conduct of litigation and not the underlying primary conduct of the parties.")

Laird v. Tatum, 408 U.S. 1 (1972), relied on by the government, is inapposite, as Judge Forrest found. Decision at 56. In *Laird* a statute had authorized the government to collect information in the mass media but conveyed no power or authority over any individual or group. *Laird* distinguished that case from a circumstance – such as the NDAA – in which the statute authorized government to take "action detrimental to [the] individual". *Laird*, 408 U.S. at 11-12, citing *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (bar admission to bar

withheld based on membership in subversive groups); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) (statute compelled discharge of state employee for political associations); *Lamont v. Postmaster General, 381 U.S. 301 (1965)*(regulation requiring postal customer to request delivery of "subversive" literature); *Baggett v. Bullitt,* 377 U.S. 360 (1964)(employees required to deny under oath membership in "subversive" groups). As to each of these cases, *Laird* recognized that the power of government to act against the individual – the same power conveyed under §1021(b)(2) - *was* "regulatory, proscriptive, or compulsory in nature,…" *Laird*, 408 U.S. at 11.

Plainly, §1021 authorizes the military to take the very type of direct action against an individual – placing individuals into custody if they commit the stipulated act of having "substantially supported" said groups or persons – that was missing from the statute in *Laird*. As Judge Forrest noted, unlike *Laird* where the "fruit of the statute" was not to be used for any present purpose, "the fruit of §1021 *is* indefinite detention." Decision at 56 [emphasis added].

The government also misquotes *Laird*. Nowhere did *Laird* say that the courts cannot be " 'continuing monitors of the wisdom and soundness' *of Congress's decision to authorize military force and the President's judgment in invoking that authority*." Gov't Bf. at 36. The italicized text above was appended by the government to the *Laird* quote but is *not* in the Supreme Court's decision.

Quite to the contrary, *Laird* reaffirms the role of the federal judiciary in resisting statutes such as §1021 that would authorize "military intrusion into civilian affairs:

> "[Plaintiffs' concerns] reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs…Indeed, *when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury;*…."

408 U.S. at 15-16. Rather than supporting the government's defense that the courts should stay out of such analysis, *Laird* holds that the judiciary *should* remedy any "actual *or threatened injury* by reason of unlawful activities of the military…" *Id*. [emphasis added].

IV. PLAINTIFFS' STANDING IS WELL-ESTABLISHED UNDER CASE LAW ADDRESSING STATUTES THAT IMPACT FIRST AMENDMENT INTERESTS THAT ARE UNQUESTIONABLY IMPLICATED BY §1021(B)(2).

Despite the district court's comprehensive standing analysis, Decision at 52-66, the government argues that the court erred in its reliance on *two* decisions, *Amnesty International v. Clapper*, 638 F.3d 118 (2d Cir. 2011), cert. granted 132 S. Ct. 2431 (2012), and *Virginia v. American Booksellers*, 484 U.S. 383 (1988). Both of these decisions, however, are apposite and sustain the district court's well-reasoned analysis.

A. Plaintiffs have standing under this Circuit's decisional law in *Amnesty International v. Clapper*, 638 F.3d 118 (2d Cir. 2011)

Plaintiffs' standing here is equally or more compelling than in *Amnesty International*, where standing was derivative of the use of the Foreign Intelligence Surveillance Act Amendments Act ("FAA"), a wiretap statute, against third persons, namely the plaintiffs' interview subjects. 638 F.3d at 121. This Court's summary of plaintiffs' standing in *Amnesty International* closely parallels the district court's reasoning below:

> '[T]he plaintiffs argue that they have standing because the FAA's new procedures cause them to fear that their communications will be monitored, and thus force them to undertake costly and burdensome measures to protect the confidentiality of international communications necessary to carrying out their jobs. Because standing may be based on a reasonable fear of future injury and costs incurred to avoid that injury, and the plaintiffs have established that they have a reasonable fear of injury and have incurred costs to avoid it, we agree that they have standing.

Amnesty International, 638 F.3d at 121-23.

A central focus of *Amnesty International* was plaintiffs' uncontroverted testimony that they "fear their sensitive international electronic communications being monitored", *id*. at 150, even though the plaintiffs themselves were never the described targets of the law. Standing arose in *Amnesty International* because plaintiffs had shown a "reasonable fear" that their communications *to third persons* would be monitored in the course of their journalistic work. 638 F.3d at 126-127.

As in *Amnesty International*, plaintiffs are journalists and human rights activists, who are directly subject to the broad undefined scope of §1021(b)(2). Their work as writers and advocates brings them into association with individuals who are either a part of or are connected with al-Qaeda and other groups that are labeled terror groups by the United States. Decision at 18,63,64,87. See e.g. Decision at 18 ("Hedges's work has involved investigating, *associating with* and reporting on *al-Qaeda*.")

The government's reliance on *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 343 (2006), is misplaced. In *Daimler* the plaintiffs lacked standing to challenge a law giving tax breaks to an automaker because plaintiffs were undifferentiated from the general public:

> "[Plaintiffs's] interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation . . . so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."

Daimler-Chrysler, 547 U.S. at 343, quoting *Mass. v. Mellon*, 262 U.S. 447, 486 (1923).

Judge Forrest noted the distinction between the attenuated "taxpayer" status in *Daimler* and plaintiffs here who have a personalized interest in the enforcement potential of the NDAA:

> "Here, the Court held an evidentiary hearing and has made findings of fact: the plaintiffs specified the actual work they have done and intend to do; they testified credibly as to their fear and lack of understanding of § 1021(b)(2);

> and the Government at that hearing would not state that they would not be detained for these activities. In other words, there are no factual similarities between Daimler-Chrysler and the case before this Court."

Decision at 57.

Unlike *Daimler*, Hedges, et al. are not "any" citizens but people whose journalistic and advocacy work brings them into direct contact with members of terrorist groups or sympathizers, including al-Qaeda, see e.g. Decision at 18, whose views or position plaintiffs promote by means of web forums, news articles and analysis, books and interviews, see Decision at 15-28, giving rise to the same reasonable fear and chilling effect as found in *Amnesty International*.

Amnesty International found standing where plaintiffs "regularly communicate . . . with precisely the sorts of individuals that the government will most likely seek to monitor," namely, those "associated with terrorist organizations." *Amnesty Int'l*, 638 F.3d at 133, 138; *see id*. at 138. Similarly, Judge Forrest found that "plaintiffs are writers, journalists, and activists", Decision at 86, who regularly communicate with the very sort of persons who would be likely to be considered as part of or associated with terror groups, Decision at 15-28, 64, giving rise to an even stronger analytical framework for standing as was found in *Amnesty International*. Under such facts, to deny standing here is to effectively overrule *Amnesty International*.

B. First Amendment standing principles support Plaintiffs' standing and their facial challenge on overbreadth grounds to §1021(b)(2).

Again focusing selectively on a single decision out of dozens cited by the district court, the government argues that *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988), is inapposite because the statute banning the sale of sexually explicit materials directly targeted the booksellers. Gov't Bf. at 39. In *American Booksellers*, the statute targeted "*any* person" who sold or displayed "for commercial purpose" sexually-oriented material that would be "harmful to juveniles". 484 U.S. at 387. NDAA has a similar reach and scope targeting any "person" who "substantially supported al-Qaeda, the Taliban or their associated forces", a textual structure analogous to that in *American Booksellers*, focusing on a class of certain actors being made subject to an undefined proscriptive regime.

Even if the statute can be said not to directly target the plaintiff, a plaintiff "may establish a cognizable injury in fact by showing that he has altered or ceased [First Amendment] conduct as a reasonable result of the challenged statute." *Amnesty International*, 638 F.3d at 140-45. Contrary to the government's defense, *Amnesty International* does not require proof that the statute will be enforced but "*some* objective evidence to substantiate [plaintiff's] claim that the challenged conduct has deterred him from engaging in protected activity." *Id*.

It was unrefuted at trial that plaintiffs are "are writers, journalists, and activists whose work falls within the protections of the First Amendment."

Decision at 86. It was equally unrefuted that each plaintiff testified that they had changed their manner of communicating, of interviewing journalistic subjects, withholding interviews from webcasts, refraining from publishing interviews with Guantanamo detainees and the like out of fear that they would be considered to be "substantially supporting" terrorist groups under §1021(b)(2). The government made no claim that plaintiffs' expressionistic works fell within the narrow exceptions for protected speech. Decision at 86, citing cases. In this regard, the trial court distinguished the instant case from *U.S. v. Williams*, Decision at 92, where a statute regulating child pornography was presumptively constitutional. *U.S. v. Williams*, 553 U.S. 285, 293 (2008).

The trial court found the government never argued that §1021(b)(2) did *not* encompass protected First Amendment activity: "[T]he Government quite carefully avoids arguing that §1021(b)(2) does not encompass activities protected by the First Amendment." Decision at 88. Indeed, it would be impossible for the government to claim the statute does not reach First Amendment activity since Congress pointedly left out the First Amendment saving clause that otherwise appears in the AEDPA. As the district court asked, if §1021(b)(2) is not intended to reach First Amendment conduct, why didn't Congress included a First Amendment "saving clause as in 18 U.S. C. §§2399A/B [AEDPA]?" Decision at 84.

To the contrary, the government actually has acknowledged – both below and in this Court - that detention under §1021(b)(2) *can* be based upon the exercise of First Amendment activity. In its formulation that "independent journalistic activities or independent public advocacy described in plaintiffs' affidavits and testimony, without more,…" will not lead to detention under §10219b)(2), Gov't Bf. at 12-13, the government effectively acknowledges that so-called *non*-independent advocacy *is* within the scope of §1021(b)(2)'s detention power.

Looked at from this point of view, §1021(b)(2) poses a direct threat to First Amendment speech and associative rights. The government offers no principled definition of "independent" journalism or advocacy; moreover, it is not clear just what the journalist or advocate must be "independent of" to qualify for the "exemption". Section 1021(b)(2) runs counter to long-standing precedent that statutes regulating or casting a net upon associative or expressionistic conduct are presumptively *un*constitutional where they lack adequate definition. *Commack Self-Service Kosher Meats v. Hooker*, 680 F.3d 194 (2d Cir. 2012) ("When a statute is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."). To survive First Amendment challenge, the statute must be "explicit" in its description of the proscribed behavior. *Commack Self-Service Kosher Meats*, supra, at 213 quoting *Thibodeau v. Portuondo*, 486 F. 3d 61, 65 (2d Cir. 2007).

"Precision of regulation" is "the touchstone in an area so closely touching our most precious freedoms." *United States v. Robel*, 389 U.S. 258, 265 (1967).

As the district court found, "[s]ection 1021(b)(2) is devoid of the required specificity". Decision at 92. A few simple examples will suffice to demonstrate the threatening and overbroad nature of the "independent" speech or advocacy standard:

Chris Hedges, a well-known war correspondent, testified that he frequently lived with, imbedded with and traveled with Middle Eastern groups designated terrorist organizations by the U.S, wore military-style clothing in the course of such activity and traveled with Middle Eastern groups that had committed terrorist attacks against the U.S. As the Court noted his work involves "associating with and reporting on al-Qaeda. Decision at 18. Is such association with terror groups "independent" under the government's standard or will Hedges's press accreditation to such groups and his imbedding with them be deemed *non*-independent and within the scope of §1021(b)(2) detention? Lacking definition, the government's "independent" advocacy standard can provide no guidance. Because the standard directly implicates associational and expressionistic rights, it sweeps a vast array of protected conduct within its ambit and is inherently unconstitutional. *U.S. v. Robel*, 389 U.S. at 265.

Birgitta Jonsdottir co-produced the film "Collateral Murder" with Wikileaks from smuggled U.S. military films that showed the killing of unarmed men outside of Baghdad. Clearly, the film created anti-American, pro-al-Qaeda sentiment as a result of the killing of apparently innocent civilians in the Middle East. TI at 148-149. In the wake of such film, Vice President Biden, who sits on the National Security Council, labeled Wikileaks a "terror" group, TI at 150, testimony the government has not disavowed. Is such conduct "independent" under the government's standard if it is labeled by a high official as being done in conjunction with a "terror" group? Whatever the current good intentions of the government, the "independent" advocacy standard gives the government virtually free reign in regulating speech.

While §1021(b)(2) may have the legitimate intent of barring direct aid to terrorist groups, the broad and undefined nature of the statutory text and the government's independent speech or advocacy standard sweep both protected *and* unprotected conduct into its path. Section 1021(b)(2) is a blunderbuss threatening First Amendment rights, not a "precision" tool. *Robel*, 389 U.S. at 265; see also *Bd. of Airport Comm'rs of the City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987)(facial invalidation of a statute reaching substantial amount of protected speech); *Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620 (1980)(same).

It is certainly protected conduct for Hedges as a journalist to observe and report on the actions of a proscribed terror group in the battlefield though it would be illegal under the AEDPA for a journalist to aid such groups on the battlefield. Where a statute captures both unprotected *and* protected conduct, it is unconstitutionally overbroad. *Robel*, 389 U.S. at 265-266 (a "statute [that] casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed" is unconstitutionally overbroad…This the Constitution will not tolerate"); see also *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (statute requiring pledge not to join subversive groups unconstitutional because it could apply to both lawful *and* unlawful organizations); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (statute barring passports for communist party members unconstitutional as it sought to regulate travel for both subversive purposes *and* travel for constitutionally valid purposes).

Taken on its own terms, the "independent" speech or "independent" advocacy standard offered by the government, even if defined (which it is not), is overbroad since much if not most protected advocacy is not "independent" at all but is associated with other people and groups. See e.g. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, *particularly controversial ones*, is enhanced by group association..."); *De*

Jonge v. Oregon, 299 U.S. 353, 364 (1937) (associative rights are "cognate to… free speech and free press and [are] equally fundamental"); accord *Healy v. James*, 408 U.S. 169, 181 (1972); *Gay Student Services v. Texas A & M University*, 737 F.2d 1317, 1326-1327 (Fifth Cir. 1984).

No case is cited by the government for the proposition that the executive branch may detain, incarcerate or punish so-called *non*-independent speech. No case is cited supporting the contention that the government has the power to judge the validity of speech or whether it is sufficiently "independent" to pass muster under §1021(b)(2). That the government reserves the right to make such distinction at all, arbitrarily and without definitional guidance, is the very model of an unconstitutional enactment. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.")

Such conundrum is the very basis of both a facial vagueness and overbreadth challenge. Hedges himself testified that though he was accredited to the New York Times, what most would regard as an "independent" journalistic outfit, he was placed by the Transportation Safety Administration (TSA) on a terrorist watch list

and detained at airports for nothing other than performing such "independent" journalistic work. TI at 179-180, 207. Can Hedges maintain confidence that he is deemed to be engaged in "independent" speech or "independent" advocacy by the government when the government itself detained him and placed him on a watch list for such activity?

Hedges also testified that he was detained by the U.S. military in Saudi Arabia because he left the army reporting pool to cover a story "independently" on how Saudi merchants were price "gouging U.S. soldiers and marines…" TI at 178-179, TI at 207-212, and on another occasion to report on the desertion of Saudi troops who failed to aid American soldiers in defense of the town of Khafji during the Gulf War. TI at 211. He said he left the pool to report independently of the U.S. military. *Id.*

Hedges's own experiences of detention by the military, albeit of short duration, arose while acting as a well-known "independent" journalist and before the passage of §1021(b)(2). TI at 207-212. Based on his own experience of detention while plying his trade as an "independent" journalist *prior* to passage of §1021(b)(2), Hedges has an even greater basis to fear detention under the broad undefined scope of the act now in force.

Other Plaintiffs testified with equal vividness as to how they or their groups were directly identified by government agencies as being a part of or associated

with extremist Muslim organizations or investigated by the government in connection with their publicizing the plight of Afghan civilians, all before the passage of §1021(b)(2).

For example, O'Brien testified her organization US Day of Rage (a campaign finance reform group) was placed on a Department of Homeland Security extremist watch list. TI at 108. O'Brien placed in evidence the DHS watch sheet (Trial Exhibit "5") obtained through a FOIA request; the Court invited the government to refute the authenticity of the document obtained under FOIA, (TI at 111) – *the government never did*. Can US Day of Rage and O'Brien remain confident that they will be regarded as "independent" speakers and therefore protected under the NDAA in a climate in which an "independent advocacy" group such as U.S. Day or Rage is placed on a DHS extremist watch list the authenticity of which the government does not deny?

Plaintiff Birgitta Jonsdottir a prominent member of the Iceland Parliament and a well-known European parliamentarian, testified as to how she has had her private e-mail accounts subpoenaed by the U.S. as a part of the investigation into Julian Assange's activities. TI at 151-153. Jonsdottir co-produced with Assange and Wikileaks Collateral Murder, the mistaken U.S. attack on a non-combatants that engendered immense sympathy for al-Qaeda and the Taliban worldwide. It was after the publication of the film that she became a government target and

Wikileaks was described as a terrorist organization by Vice President Biden and Secretary of State Hillary Clinton, both members of the National Security Council. See TI at 148-150.

Surely, if a member of an allied parliament, a member of NATO, is subject to federal subpoena for her work in publicizing injustice to Iraqi villagers through her work with an organization labeled a "high tech terror" group by the Vice President of the United States (testimony the government did not dispute though it could have easily done so if such facts were not true), she has a reasonable basis to fear detention under a statute that subjects detainees to military incarceration for "substantially supporting" al-Qaeda and their associates. Far from being speculatively obsessed as the government asserts, Ms. Jonsdottir would be abnormal if she did not maintain such fear in the face of the unrestrained language of §1021(b)(2).

Thus, even if the government means in good faith to avoid detention of plaintiffs and others like them, their experiences, as they testified, provides a reasonably objective basis to fear detention sufficient to chill the exercise of their First Amendment rights and those of others not presently before the court. Indeed, it is §1021(b)(2)'s "very existence [that] will inhibit free expression." Cf., *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984).

In this light, it must be remembered that Justice Department lawyers refused, repeatedly, in open court, on the record, to offer concrete assurances that plaintiffs' speech/conduct would not subject them to NDAA detention: "At the hearing on this motion, the government was unwilling or unable to state that these plaintiffs would not be subject to indefinite detention under [Section] 1021 [of the NDAA]. Plaintiffs are therefore at risk of detention, of losing their liberty, potentially for many years." Preliminary Injunction, May 16, 2012 at 54 ("May 16 Opinion"); see also May 16 Opinion at 14-28,40,43,48,51,52. Judge Forrest reiterated the findings in the permanent injunction. Decision at 4,5,16-29.

When asked whether plaintiffs' activities fell within §1021's scope, the government responded, "I can't make specific representations as to particular plaintiffs. I can't give particular people a promise of anything." TI at 235. When asked about each plaintiff the government stated specifically that the government would NOT represent that each plaintiff would be free from §1021 detention. See TI at 236,239,245. Even as to the Hon. Birgitta Jonsdottir, member of Iceland's Parliament, the following colloquy took place:

The court: "I'm asking you as a representative of the United States Government here today, can Ms. Jonsdottir travel to the United States without any concern that she will be captured by her current activities under section 1021?" The government responded: "Again, I can't make representations on specifics. I

don't know that she has been up to. I don't know what is going on there." TI at 239. The US Attorney went so far as to say in regard to O'Brien's campaign finance group, "Maybe they are an armed group." TI at 236.

The government refused to specifically state that Pulitizer-prize winning Journalist Chris Hedges could not be subject to detention under the NDAA. The court asked: "…can you say the he would not be subject to military detention without trial under section 1021?" The government responded: "I'm not prepared to address that question here today, but I would answer that by saying that his concerns that he has raised are addressed by what I have said and he has the burden of showing that his fear as articulated is a reasonable fear." TI at at 245. In other words the government refuses to say this internationally known journalist is safe under §1021(b)(2). TI at at 178-180.

After its loss on preliminary injunction, the government changed position to imply that plaintiffs might not be subject to detention should they engage in "independent journalistic expression." Judge Forrest dealt with these shifts in the government's position. Decision at 29-32,67-70. Judge's Forrest's response is the same as this Court ought to adopt: "Shifting positions are intolerable when indefinite military detention is the price that a person could have to pay for his/her, or law enforcement's, erroneous judgment as to what may be covered." Decision at

70. As civilian detention is available under §1021(b)(2) by the government's own statements at trial, plaintiffs' fears *are* objectively reasonable.

Thus, even if the "independent" advocacy exception somehow protects plaintiffs, it was offered *after* trial on preliminary injunction while standing attaches at the outset. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 (1992). As the government during the trial refused such assurances, plaintiffs standing remains regardless of the *later* proffer. Decision at 65.

Where a facial challenge is based upon First Amendment overbreadth, plaintiffs also have standing to protect the right of third parties not before the court. *Alexander v. United States*, 509 U.S. 544, 555 (1993). Standing is "relaxed" in First Amendment challenges, Decision at 61, because the public interest requires that an overbroad statute not have a deleterious impact on expressionistic rights. In *Broadrick*, the Court stated that because the First Amendment needs "breathing space," traditional rules of standing are relaxed when the challenge relates to speech, 413 U.S. at 611, as it does here:

> "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expressions are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Id. at 617.

See also *American Booksellers*, 484 U.S. at 392-393, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (recognizing "jus tertii" or third-party

standing, to protect broader expressionistic rights of the public beyond those of the named plaintiffs.)

Stevens recognized that where a statute impinges on significant First Amendment interests, plaintiffs are not limited to an "as applied" challenge but may challenge the provision in its entirety where a substantial number of its applications are deemed unconstitutional, judged in relation to the statute's "plainly legitimate sweep". *Stevens*, 130 S. Ct. at 1587. In such circumstances, a plaintiff is not required to show that there are no legitimate applications of the statute, as would otherwise be the case in non-First Amendment facial challenge. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

That plaintiffs have not yet been detained under §1021(b)(2) is inapposite to the standing analysis where the statute reaches protected conduct. *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513(11th Cir. 1985) ("The danger in an overbroad statute is not that actual enforcement will occur or is likely to occur, but that third parties, not before the court, may feel inhibited in utilizing their protected first amendment communications because of the existence of the overly broad statute.")

In any event, Chris Hedges has been detained in the past as a result of his "independent" journalism, Jonsdottir has been investigated by the government and her associate Wikileaks described by the Vice President and the Secretary of State as a terror organization and O'Brien's group US Day of Rage (also a plaintiff)

having been labeled an extremist organization by DHS, the government's objections to plaintiffs' standing ring hollow and are specious at best.

C. Plaintiffs have changed their behavior in consequence of the NDAA, as they testified and the District Court found.

At p. 3 of its merits brief, the government makes the bald statement that "Notably, plaintiffs could not even show – despite their claimed fears – that they actually have changed their behavior in any material way." If true, the government's contention would bear some weight on the chilling effect of the §1021(b)(2), but the government's statement is directly contrary to the trial record.

For example, plaintiff Alexa O'Brien testified that she has refrained form publishing articles on the WL Central (Wikileaks Central) web site because of fear of the implications of the NDAA. O'Brien testified that the articles relate directly to al-Qaeda and Taliban detainees at Guantanamo:

> A. The first one is basically a very long, hour, I think I have several hours of conversations with a former military personnel at Guantanamo describing information about the physical restrains used at Guantanamo and other information."
>
> Q. And the second?
>
> A. The second relates to in the process of working as a journalist one does research talks to different individuals. I'm aware of and participated in a discussion with a defense attorney for a detainee who made accusations of a military defense lawyer for a detainee throwing a case.

TI at 70-71.

O'Brien testified specifically that she made the decision to withhold the articles from publication "after the passage of the NDAA":

> The Court: When did you make the decision to not publish the article relating to the military personnel describing physical restraints? When did you make the decision to hold back publishing that article?
>
> *****
>
> The Witness: *After the passage of the NDAA*.
>
> The Court: The same question with respect to the article relating to the detainee accusing a lawyer of throwing a case. Was that decision made prior to or subsequent to the passage of the NDAA?
>
> The Witness: The discussion with the defense lawyer, I want to make sure that it is clear – I clarified that in the deposition as well – that that is also *after the passage of the NDAA*.

TI at 72. O'Brien testified that there that the decision not to publish was causally related to the NDAA:

> The Court: Are you saying that there is a causal relationship between the passage of the NDAA and your withholding both of these articles?
>
> The Witness: Absolutely.

TI at 72.

O'Brien also testified that her fear of publishing is based on her awareness of at least four journalists who have been detained by the U.S. including two Americans, David House and Jacob Applebaum, detained in the United States and who had their electronic equipment seized by federal authorities, as well as Sami al-Haj, held by the U.S. for six or seven years and then freed without charge and

Omar Deghayes, who was detained at Guantanamo, Bagram and Lahore. TI at 74-77.

Kai Wargalla testified that Revolution Truth, the US-based group of which she is deputy director, will no longer invite representatives of Hamas to its web stream panel discussions because of fear of NDAA:

> Q. In your work at Revolution Truth, you mentioned something abou live panels, I believe you testified to.
>
> A. Yes.
>
> Q. Describe what those live panels are.
>
> A. We conduct live panel discussions that we live stream on the Internet, we record it and put it online later, about current political topics, such as Occupy, the Black Blog. Yes.
>
> Q. Could you state your title again at Revolution Truth. I want to be sure I have it correct.
>
> A. That would be the deputy director.
>
> Q. In your capacity as deputy director, are you awre of any changes in the live panels that Revolution Truth intends to make in consequence of the NDAA?
>
> A. Yes.
>
> * * *
>
> Q. With respect to the live panels, what changes are being made by Revolution Truth or what will you no longer do in consequence or as a result of the NDAA at this time?
>
> A. I can only speak for myself. I think that we won't invite people from groups like the Hamas, because this is not only about me and accepting the

> consequences of that for me, it's also about the whole group. I wouldn't want to put anyone in the group I'm working with in danger.

TI at 124-126. Like O'Brien, Wargalla plainly testified as to changes in the manner of conducting Revolution Truth's web casts.

Jonsdottir testified that because of the NDAA she has been advised by her government's Foreign Ministry not to travel to the U.S. without "assurances in writing" that she will not be detained. She testified specifically that she had refused to "keynote many key events in the USA", that "I have had to decline all these offers and have therefore sacrificed important contacts and money." TI at 153-154. She attributes this change in her activities to fear she would be labeled as one who has " 'substantially supported' groups considered as either terrorist groups or their associates". TI at 154-155. In light of the fact that Wikileaks, whom she aided in promoting a film about U.S. deaths among Afghan villagers in the war with al-Qaeda has been labeled a "terror" group by the Vice President and Secretary of State, Parliamentarian Jonsdoittir's fear and her change in activities is objectively reasonable.

Hedges testified he has been injured in his journalistic work because sources have dried up due in part to "the NDAA". TI at 203. He testified on cross-examination that because of the NDAA he is now reluctant to interview figures from groups that "advocate violence". While counsel for the government attempted to lead Hedges into stating that it was *other* statutes that has caused such

reluctance, Hedges made it clear it was the new NDAA that has had such implications:

> Q. You talked about reluctance to speak to groups such as the Avakian Revolutionary Party that advocate violence, is that right?
>
> A. They are a Maoist organization that believes ultimately in the use of revolutionary force.
>
> Q. You now find yourself reluctant to speak to them, is that right?
>
> A. I find a greater reluctance since the NDAA to associate with any groups that embrace acts that could be construed as terrorsit.
>
> Q. That reluctance of yours results from a series of measures that include the NDAA, is that correct?
>
> A. No, it results from the NDAA.

TI at 2030204. He testified that while other statutes made him "skittish", it is the NDAA causeing him "fear". TI at 204.

Such testimony supports the district court's finding that plaintiffs have been chilled in their First Amendment rights by the threat of incarceration under §1021(b)(2).

V. THE DISTRICT COURT PROPERLY FOUND §1021(B)(2) UNCONSTITUTIONAL DUE TO FACIAL VAGUENESS

Facial vagueness arises where a person of ordinary intelligence cannot determine the nature of the conduct covered by the enactment. Cf., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), citing *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). See *Grayned v. City of Rockford*, 408 U.S. at 108-114

(1972); *Colten v. Kentucky*, 407 U.S. 104, 110-111 (1972); *Cameron v. Johnson*, 390 U.S. 611, 616 (1968). *Broadrick* holds that where there is a lack of direction as to the covered conduct the statute will fail for facial invalidity but where there is ample definitional structure the statute will not be invalid. 413 U.S. at 607-608.

In *Holder* the court upheld the AEDPA because, as in *Broadrick*, the statute identified with specificity the proscribed financing and in-kind support of designated terrorist groups that AEDPA targets. As the Court in *Holder* noted, the term "material support or resources" in AEDPA contains a specific and highly targeted definition of the prohibited non-speech activity:

> "[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel…, and transportation, except medicine or religious materials."

18 U.S. C. § 2339A(b)(1); § 2339B(g)(4). *Holder* noted that Congress "took care to add narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute's terms." *Holder*, 1130 C. Ct. at 2720.

NDAA, however, contains no definitions of any kind, let alone the "narrowing definitions" that aided the AEDPA to survive a facial vagueness challenge. *Id.* NDAA is also not conditioned upon "knowing" or intentional" conduct. In *Holder* the Court upheld the statute, in part, because it contained a

scienter or willfulness standard that is utterly lacking in the NDAA. Accord *Grayned v. City of Rockford*, 408 U.S. at 113-114 (noise ordinance not void where it contained definitional provisions of covered conduct *and* required that any violation be "willfully done").

NDAA is devoid of any definitional structure – it contains no definitions of any kind, particularly as to the term "substantially support" - and does not even import by reference the definition of "material support" as used in the AEDPA. The government could offer no definition at trial of any of the material terms of the NDAA including "substantially supported", "directly supported" and "associated forces". Decision at 4-5, 105-106. Indeed, the government conceded "there is no case that dealt with what "directly supported" means," Decision at 106, citing Tr. I at 216, and "no court has defined 'substantial support.'" *Id*. The trial court concluded that " 'materially supported' as used in Al-Bihani does not shed light on the interpretation of 'substantial support,'", *Id.* at 106, and that the term "associated forces" was without definition in the statute, none was offered by the government and it is, in fact, "an undefined, moving target, subject to change and subjective judgment". *Id*. On appeal, the government offers no reply to §1021(b)(2)'s definitional void.

As the Court concluded, "the respective meanings of the terms at issue are unknown; the scope of § 1021(b)(2) is therefore vague; but the penalty of running

afoul of it is severe." On this basis, the court properly concluded that "[s]ection 1021(b)(2) is…impermissibly vague under the Fifth Amendment." *Id.*

VI. THE PERMANENT INJUNCTION DOES NOT IMPERMISSIBLY INTRUDE UPON THE PRESIDENT'S POWER AS COMMANDER IN CHIEF SINCE THE EXECUTIVE HAS NEVER HAD MILITARY DETENTION POWER OVER CIVILIANS NOR DOES CONGRESS HAVE SUCH POWER UNDER THE "REGULATION" CLAUSE, ART. I, §8 CL. 14

A. The court has no duty of deference to the executive as to military detention of civilians.

Hamdi v. Rumsfeld rejects outright any claim that the courts must defer to the executive branch in matters concerning detention by the military. *Hamdi,* citing *Ex Parte Milligan,* 71 U.S. 2 (1866), held that "an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." 542 U.S. at 530. *Hamdi* denies a "circumscribed" role for the courts even where the claimed power is incidental or derived from the war-making authority:

> *"[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances….We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.* Youngstown Sheet & Tube, 343 U.S., at 587, 96 L. Ed. 1153, 72 S. Ct. 863. Whatever power the United States Constitution envisions for the Executive…in times of conflict, it most assuredly envisions *a role for all three branches when individual liberties are at stake*.

542 U.S. at 535-536 [emphasis added]. Accord, *Hamdan v. Rumsfeld,* 548 U.S. 557, 588-589 (2006), recognizing that *Ex parte Quirin, 317 U.S. 1 (1942)*

"provides compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan* also held that where plaintiff's claims arose under domestic law, namely the law of war as imported into the Uniform Code of Military Justice, as the government claims has occurred in the NDAA, judicial review *is* properly applied, regardless of the relationship to the President's war making powers. *Hamdan* at 626.

President Obama in his signing statement for the NDAA conceded the authority to interpret Executive Branch power rests with the Article III courts: "it is not for the President to both expand the power of the Executive and to interpret that power. *That power is reserved* solely for *Article III judges.*" Presidential Signing Statement, National Defense Appropriate Act of 2011 [emphasis added].

This is hardly new doctrine. See e.g. *Johnson v. Eisentrager*, 339 U.S. 763,790 (1950 (judicial power is "unquestioned" as to detention of "persons both residing and detained within the United States".); *Ahrens v. Clark*, 335 U.S. 188 (1948) (recognizing Article III jurisdiction over detained enemy aliens) and *Ex parte Endo*, 323 U.S. 283 (1944)(recognizing Article III jurisdiction over detained Japanese Americans).

Habeas relief is not a sufficient protection against such intrusion into liberty interests, particularly where there exists a long-standing presumption against

military detention. While NDAA §1021(e) does states that "existing authorities", whatever they may be, shall be applicable to citizen detainees, this is not a satisfactory reply to military detention. Under this provision U.S. citizens can *still* be detained by the military but will have rights under "existing…authorities", a vast change from the more limited scope of detention recognized by President Bush under the AUMF that *excluded* citizens from its coverage *ab initio*.

The district court noted that habeas relief, if that is what is meant by §1021(e), is not a satisfactory remedy to the burden of military detention due to the many cases in which years ensue before the detainee sees judicial relief. Decision at 76, 104-105 and n. 43. The district judge noted specifically that in *Almerfedi v. Obama*, 654 F. 3d 1, 5 (D.C. Cir. 2011), it took seven years for the detainee's case to reach the courts. Id. at n. 43. By way of further example, *Hamdi* was adjudicated in 2004, a delay of three years from the detainee's incarceration. No case has taken less. Habeas is a remedy of last resort, intended where the governmental machinery has gone awry, not an excuse to permit detention that is otherwise presumptively unconstitutional as shown by nearly two centuries of jurisprudence.

As case law shows, the Court, via *Hamdi, Hamdan, Milligan,* has rejected the jurisdictional barrier urged by the government , i.e., that §1021 falls within the

President's war making powers and is beyond judicial review.[9] This doctrine has never been accepted by the Supreme Court and has been rejected on multiple occasions. Judge Forrest broke no new ground in so holding as shown by her detailed analysis of the role of the judiciary in such matters. See Decision at 70-82.[10]

B. The President Cannot Be "Irreparably Harmed" by the District Court's Injunction as the President has Never Had the Power To Place Citizens and Civilians in the U.S. in Military Custody.

The Framers would be greatly shocked to hear the United States assert that an American President has power to place civilians in the U.S. or citizens abroad into military custody absent status as armed combatants. No President has ever held such power. *Four times* the Supreme Court has rejected presidential claims that civilians in the U.S. may be held in military custody where the civil courts are open and functioning even in circumstances such as *Ex parte Milligan*, 71 U.S. 2 (1866) where war raged within the domestic territory of the nation.

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[9] *Hamdan's* majority rejected dissenters' claims that judicial rejection of DTA §1005(e)(1) would "sorely hamper the President's ability to confront and defeat a new and deadly enemy", *Hamdan v. Rumsfeld*, 548 U.S. at 705 (Thomas, J. dissenting).

[10] *Franklin v. Massachusetts*, 505 U.S. 788 (1992) and *Mississippi v. Johnson*, 4 Wall. 475 (1867), are inapposite. *Franklin's* majority held injunctive relief *is* available against the President but determined it to be unnecessary since "declaratory relief" as to the Secretary of Commerce was sufficient for redressibility. 505 U.S. at 803. *Franklin* thus confirms injunctive relief *is* available against the President *and his cabinet*. *Mississippi* concerned an effort to bar a President from carrying out a lawful public policy, in contrast to Judge Forrest's order barring a form of military detention of civilians long prohibited by the Supreme Court and outside of the President's "constitutionally assigned functions." Cf., *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 443 (1977).

In *Hamdi* the Court iterated yet again the long-standing principle that the Executive has *no* military detention power over civilians. For this unsurprising proposition, *Hamdi* cited *Milligan* where the Supreme Court reversed a civilian's detention precisely because the citizen - Milligan - was a civilian living in civilian life at the time of his arrest and was not in a theatre of combat, even though other parts of the U.S. were then engaged in actual warfare.

Hamdi makes it clear that under *Milligan* the Executive has no power, *even in wartime*, to detain a civilian in military custody where the civil courts are open and functioning. Interpreting *Milligan*, *Hamdi* stated:

> In that case [*Milligan*], the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. [citation omitted] *That fact was central to its conclusion*. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different.

Hamdi, 542 U.S. at 522.

Hamdi recognizes that no civilian, except on a field of battle where engaged in conflict against the armed forces of the United States, can be placed in military jurisdiction. Section 1021(b)(2) authorizes a power that is constitutionally denied the President, as the Supreme Court made clear in *Hamdi*. Notably, *Hamdi* adopted *Milligan* in the context of the existing conflict against Al-Qaeda under the

AUMF, a further repudiation of the government's claim that §1021(b) merely replicates the President's long-recognized power under the AUMF.[11]

C. Congress Lacks Power Under the Necessary and Proper Clause To Extend Military jurisdiction Over Civilians

Judge Forrest's holding that persons in the U.S. and citizens abroad may not be detained by the military made no new law, resting on *Hamdi* and on the Supreme Court's earlier decision in *Reid v. Covert*, 354 U.S. 1 (1957), where the Court held that Congress lacks power to extend military jurisdiction to civilians:

> "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights the Necessary and Proper Clause cannot extend the scope of Clause 14.

Reid, 354 U.S. at 21. As *Reid* holds, Congress cannot use Art. I, §8, Cl. 14 power to "make rules for the…Regulation of the land and naval Forces" as a basis on which to extend military jurisdiction over civilians. 354 U.S. at 22. Of special significance is *Reid's* recognition that the power to create regulations under the Necessary and Proper Clause is subordinate to the Bill of Rights, 354 U.S. at 22-25, as Judge Forrest concluded. Decision at 76-82. In other words, Congress despite its power to regulate the military under Art. I, §8 Cl. 14, may not extend

[11] Accord, *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946); *United States ex re. Toth v. Quarles*, 350 U.S. 11 (1955), cited in *Reid v. Covert*, 354 U.S. 1 at 31-32.

such authority over civilians in derogation of their right to trial by jury before the civil courts.

Reid definitively holds that Congress cannot make civilians subject to military jurisdiction:

> Not only does Clause 14, by its terms, limit military jurisdiction to members of the "land and naval Forces," but Art. III, § 2 and the Fifth and Sixth Amendments require that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions -- safeguards which cannot be given in a military trial. In the light of these as well as other constitutional provisions, and the historical background in which they were formed, *military trial of civilians is inconsistent with both the "letter and spirit of the constitution*."

354 U.S. at 22 [emphasis added]. NDAA §1021(b) authorizes precisely what *Reid* said is beyond Congress's constitutional powers.

Hamdan v. Rumsfeld recognized that even in the context of the continuing conflict in Afghanistan, "exigencies of war" will not justify imposition of military jurisdiction over non-combatant civilians:

> Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution...See *Ex parte Milligan*, 71 U.S. 2, 4 Wall. 2, 121, 18 L. Ed. 281 (1866) ("Certainly no part of the judicial power of the country was conferred on [military commissions]"); *Ex parte Vallandigham*, 68 U.S. 243, 1 Wall. 243, 251, 17 L. Ed. 589 (1864); see also *Quirin*, 317 U.S., at 25, 63 S. Ct. 2, 87 L. Ed. 3 ("Congress and the President, like the courts, possess no power not derived from the Constitution"). And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war….; *In re Yamashita*, 327 U.S. 1, 11, 66 S. Ct. 340, 90 L. Ed. 499 (1946).

548 U.S. at 591.

It is undisputed that the NDAA, §1021(b)(2) is drafted in terms that authorize military jurisdiction over civilians, including U.S. citizens detained in the U.S. and abroad. Indeed, that appears to be its primary function, as distinguished from its companion §1022(a)(2)(B) that is directed solely at combatants. As case law makes clear, the sole and singular constitutional basis for the imposition of military jurisdiction over civilians arises where the civilian is arrested in a theatre of combat, where the courts are "actually closed, and it is *impossible* to administer criminal justice according to law…" *Hamdan* at n.25 citing *Milligan*. Judge Forrest correctly held §1021(b)(2) to be unconstitutional in that it makes *none* of these conditions predicates for imposition of military jurisdiction; her conclusion that only a person "engaged in armed conflict with the United States" can be subject to military detention comes directly from the Supreme Court's holding in *Hamdi*. Decision at 35 citing *Hamdi*, 542 U.S. at 526. Reliance on well-established Supreme Court holdings is hardly an "extraordinary" act threatening the Constitutional function of the Executive.

Nor is the injunction an impermissible interference with military operations, being directed only to §1021(b)(2), leaving unimpaired §1022 governing *combatant* detentions. See Decision at 14, 123, directing relief "as *set forth in § 1021(b)(2),…*" and *as* "enjoined by this Order *regarding § 1021(b)(2)*". Judge Forrest left all other parts of the NDAA and, specifically, the AUMF in force:

> "When the AUMF is read according to its plain terms and criminal statutes considered, it reasonably appears that the Government has the tools it needs to detain those engaged in terrorist activities and that have not been found to run afoul of constitutional protections."

Decision at 45. The district judge also left intact the government's wide range of anti-terrorism laws. Decision at 45,48,52,112. So crafted, the injunction does not impermissibly intrude upon Executive ability to fight terrorism or wage war, as the government's hyperbolic argument would otherwise suggest.

In sum, the President, at least within the domestic territory of the United States, has *never* had the authority conveyed under section 1021(b) (2) as to civilians in the U.S. or as to U.S. citizens abroad (except where "engaged in armed conflict against the United States, *Hamdi*, 542 U.S. at 526). By so authorizing, §1021(b) (2) is in violation of "the deeply rooted and ancient opposition in this country to the extension of military control over civilians". *Reid* at 33. The President cannot be "irreparably harmed", nor his constitutional functions interfered with, by an injunction prohibiting him from doing what the Constitution forbids and what the Supreme Court has at least four times rejected.

CONCLUSION

Based on the foregoing, and for the reasons in the district court's final judgment, the appeal should be denied.

Dated: December 10, 2012

Respectfully Submitted,

s/

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CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 13,940 words of text.

The brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2003, Times New Roman, Size 14.

Dated: December 10, 2012

s/
Carl J. Mayer, Esq.

db