No.

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER HEDGES,
DANIEL ELLSBERG, JENNIFER BOLEN,
NOAM CHOMSKY; ALEXA O'BRIEN,
US DAY OF RAGE; KAI WARGALLA,
HON. BRIGITTA JONSDOTTIR M.P.,

Plaintiffs,
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,
JOHN McCAIN, JOHN BOEHNER,
HARRY REID, NANCY PELOSI,
MITCH McCONNELL, ERIC CANTOR
as representatives of the UNITED STATES
OF AMERICA

Defendants.

# PLAINTIFFS-PETITIONERS' EMERGENT APPLICATION TO VACATE TEMPORARY STAY OF PERMANENT INJUNCTION

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## INTRODUCTION

This is an emergent motion, submitted to Justice Ginsburg, pleading that the Supreme Court vacate a stay pending appeal entered on October 2, 2012 by the Court of Appeals for the Second Circuit.

The stay freezes a permanent injunction issued by the United States District Court Judge the Hon. Katherine B. Forrest sitting in the Southern District of New York on September 12, 2012.

District Judge Forrest's order permanently enjoined a provision of a statute that allows, for the first time since the internment of Japanese-Americans during World War II, the indefinite detention of civilians, including United States citizens, in military prisons. The same statute would subject civilians, including American citizens, to military trials rather than civilian trials and permits the detention of civilians and American citizens anywhere in the world; said statute would even permit the deportation of civilians and American citizens to foreign countries or "entities." This statute violates the nearly 200 year-old principle that the military does not police our streets.

The effect of the Second Circuit stay is to place the plaintiffs in this action and many United States civilians and citizens in actual and imminent danger of losing their core First Amendment rights and fundamental Equal Protection liberties. The stay actually upends the status quo that has been in place for most of our nation's history: that the military cannot detain civilians. District Judge Forrest was clear on this point:

> A key question throughout these proceedings has been, however, precisely what the statute means --- what and whose activities it is meant to cover. This is no small question bandied about amongst lawyers and a judge steeped in arcane questions of constitutional law; it is a question of defining an individual's core liberties. The due process rights guaranteed by the Fifth Amendment require that an individual understand what conduct might subject him or her to criminal or

> civil penalties. Here the stakes get not higher; indefinite military detention – potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity – and that specificity is absent from section 1021 (b) (2). [The statute at issue here][Ex. A, Opinion and Order of Judge Forrest, dated 9/12/12 at p. 4 ("Order").]

Unless this Court lifts the stay, core constitutional rights will continue to be violated and the status quo that the military cannot detain civilians will be upended pending an appeal process that could take many months if not years.

## THE STATUTE AT ISSUE: THE "HOMELAND BATTLEFIELD" ACT.

Judge Forrest's order (now stayed) permanently barred the United States from enforcing §1021(b) of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011) ("the NDAA").

Some Senate sponsors of this legislation, including Senator Lindsey Graham (R. S. Carolina) informally called this the "Homeland Battlefield Act" because of the Senators' belief that the United States itself has become a battlefield in the so-called "war on terror": an undefined "war" against a tactic rather than a defined enemy or nation-state and one possibly without end. Senator Graham, who has submitted an *amicus* brief in the Second Circuit proceedings, had this to say about the statute at issue here: "It is not unfair to make an American citizen account for the fact that they decided to help Al Qaeda to kill us all and hold them as long as it takes to find intelligence about what may be coming next. And when they say, 'I want my lawyer,' you tell them, 'Shut up. You don't get a lawyer.'"[1]

[1] http://reason.com/reasontv/2011/12/05/matt-welch-interview-lori-from

As a result of the Second Circuit's stay order, §1021(b) of the NDAA can now be enforced though the district court has held the enactment to be unconstitutional.

NDAA §1021(b) enables the government to detain civilians, including U.S. citizens and non-citizens residing in the U.S., in military custody indefinitely, without trial, if they:

> "*substantially supported* al-Qaeda, the Taliban, 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 such hostilities in aid of such enemy forces."

Section 1021(b) (2) [emphasis added].

Section 1021(a) states that such "covered persons" may be detained under the "law of war" as follows under §1021(c):

> (c) Disposition Under Law of War.--The disposition of a person under the law of war as described in subsection (a) may include the following:
>
> (1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.
>
> (2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111-84)).
>
> (3) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction.
>
> (4) Transfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity.

Section 1021(c).

As §1021(c) makes clear, a "covered person" under §1021(b) who "substantially supported" "al-Qaeda, the Taliban or their associated forces" may be held by the military "for the duration of hostilities" (meaning indefinitely) and subject to trial by court martial, trial by military commission, transfer to undescribed "alternative" jurisdictions or

extraordinary rendition, or given no trial at all. No provision is made in §1021(b) for a civil trial or recourse to the civil courts.

Section 1021 contains no definitions as to its operative terms "substantially supported" or "associated forces". Similarly, it does not define "Al-Qaeda", a group that is at best amorphous with no clearly known definition.[2] Judge Forrest permanently enjoined §1021(b) of the NDAA whose broad undefined terms would enable the detention of U.S. civilians and citizens in military custody without guaranteed recourse to the civil courts, as required by Fifth Amendment due process concerns.

Judge Forrest's injunction was limited to only one section of the NDAA, §1021 that enables detention of U.S. civilians. She left intact §1022, a separate provision that enables the President to detain persons taken in the course of actual hostilities. Specifically, §1022 enables the President to detain any person who is found:

> (A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and

---

[2] Asia Times OnLine, http://www.atimes.com/atimes/Middle_East/FH13Ak05.html, gives a concise demonstration of the lack of precision in framing detention statutes on the basis of describing groups as "al-Qaeda". Citing U.S. intelligence analyst Jonathan Feiser, Asia Times noted the lack of precision in any reference to al-Qeuda:

"Jonathan Feiser very capably makes the point that "al-Qaeda" has become, in effect, a trademark or a brand name, one that can be, so to speak, stamped upon the front of mostly autonomous regional terrorist movements that are indigenous - that is, not necessarily imported literally from the ranks of bin Laden's intimate followers or founded directly by him or under his explicit instructions and guidelines.

Feiser points out that this "al-Qaeda" trademark carries with it the considerable "illusive power of its manufactured symbolism", notably by virtue of its "ideological mandate", the "spirit of the original al-Qaeda mandate", the "cause which defines the legitimacy of the group". Consequently, widely distributed terrorist movements draw on the power and legitimacy of the trademark, while mostly retaining their own autonomy and preferred characteristics, organizational structure and regional goals."

http://www.atimes.com/atimes/Middle_East/FH13Ak05.html.

(B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

Section 1022.

**STAY ISSUED BY THE COURT OF APPEALS**

The Second Circuit Court of Appeals entered the stay on October 2, 2012 for the following reasons as stated in its brief three-page opinion and order:

> First, in its memorandum of law in support of its motion, the government clarifies unequivocally that, "based on their stated activities," plaintiffs, "journalists and activists . . . are in no danger whatsoever of ever being captured and detained by the U.S. military."
>
> Second, on its face, the statute does not affect the existing rights of United States citizens or other individuals arrested in the United States. See NDAA § 1021(e) ("Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.").
>
> Third, the language of the district court's injunction appears to go beyond NDAA § 1021 itself and to limit the government's authority under the Authorization for Use of Military Force, Pub L. 107-40, 115 Stat. 224 (Sept. 18, 2011). [Ex. B, Second Circuit Court of Appeals Stay Order of 10/2/12 ("Second Circuit Stay")]

**REASONS FOR THIS MOTION TO VACATE THE STAY**

The core reason that the Supreme Court should lift the Second Circuit stay is that the government's representations in its papers that the plaintiffs here would not be detained directly contradicts the findings of the trial court below and even contradicts the representations of the government's own attorneys at a trial and hearing before Judge Forrest in the Southern District of New York. Indeed, it is the ever –shifting nature of the government's representations that highlight the dangers of the NDAA: the vague language of the statute allows the Executive Branch untrammeled power to use the

military to detain civilians, even on the "homeland battlefield": i.e. the United States of America. As the District Court found, absent an injunction, the very existence of the NDAA violates the First Amendment by chilling the core First Amendment speech of plaintiffs and other civilians in similar positions.

At trial Judge Forrest cross-examined the United States government lawyers about whether they could give assurances to the plaintiffs in this case – all of whom are either journalists or activists with no ties to terrorists, other than journalistic – that their speech and conduct would not subject them to the provisions of the NDAA. Repeatedly, Justice Department lawyers refused, in open court, on the record, to offer any such assurances. As Judge Forrest wrote in her opinion granting a preliminary injunction of the same provision that was permanently enjoined: "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." Ex. C. Opinion of District Court Judge Forrest, May 16, 2012 at 54. ("May 16 Opinion") See Also May 16 Opinion at 14-28, 40, 43, 48, 51, 52 and 54.

The district court, and the trial record, could not be clearer on this point and the district court's May 16 preliminary injunction and September 12, 2012 permanent injunction were in accord. In fact, the district court judge in her September 12, 2012 opinion and order reiterated the findings from the earlier May 16 preliminary injunction and incorporated same. "At the March hearing, the government was unable to represent that the specific activities in which plaintiffs had engaged would not subject them to indefinite military detention under § 1021" Order at 29. See also Order at 4, 5, 16-29.

When asked, on the record, in open court, 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." Ex. D Hearing Before District Judge Forrest on March 30, 2012 at 235. ("March 30 Hearing") See also May 16 Opinion at 33-35.

Not only did the government decline to call any witnesses who would state on the record that none of the plaintiffs in this case are at risk of detention, but the government's lawyers, when questioned on the record, in open court, about each plaintiff stated specifically that the government would NOT represent that each plaintiff would be free from detention under §1021. See March 30 hearing at 236, 239 and 245. See also May 16 Opinion at 33-35.

The government's comments on the record only highlighted the vague, over-reaching ambit of § 1021. For example, in discussing an elected member of Iceland's Parliament, Hon. Birgitta Jonsdottir, 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." March 30 Hearing at 239. Actually, the government knew -- because it had Ms. Jonstoddir's certification and were offered the opportunity to depose her (which they declined) -- that Ms. Jonstoddir is Iceland's leading poet and one of her few political activities before being elected to Parliament had been to participate in the making of a documentary film about alleged war crimes in Iraq. For this, her Twitter

accounts and bank records were subpoenaed by the Justice Department. That the government cannot assure an elected member of Parliament of one of our allies that they will not be detained under the NDAA shows the danger of allowing the stay to remain in place.

Similarly, the government refused to specifically state that Pulitzer-prize winning former New York Times journalist Chris Hedges could not be subject to detention under the NDAA. The court asked: "Is it possible, in your view, that Mr. Hedges, any of his activities as he has described them, should they occur in the future, [and also as to his past activities], can you say the he would not be subject to military detention without trial under section 1021?" The government responded by stating: "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." March 30 hearing at 245. The government's statements are unsurprising given that Hedges in fact testified that the military had detained him already while he was reporting in the Middle East for the New York Times. March 30 Hearing at 178-180.

In order to obtain a stay of the district's court's order, the government has now, in contrast to its positions on the record at trial, asserted in its briefs to the Second Circuit that the plaintiffs ought not to fear detention. This is the second time the government changed its position. After the government lost on the motion for a preliminary injunction, it changed its position to imply that plaintiffs might not be subject to detention should they engage in "independent journalistic expression." This has become a pattern: when the government loses a motion, it changes its position. Judge Forrest dealt with

these shifts in the government's position in her opinion of September 12. See Order at 29-32, 67-70. Judge's Forrest's response is the same one this Court ought to adopt here: "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." Order at 70.

The Second Circuit erred in vacating the stay because it did not defer to the trier of fact regarding the issue of imminent harm. Furthermore, the government submitted no new evidence or even an affidavit or certification to the Second Circuit; it only made assertions in its briefs that contradict the record below.

The second reason that the Supreme Court should vacate the Second Circuit stay is that the "savings clause" relied upon by the Second Circuit is ambiguous at best and provides no basis for protecting civilians from military detention. The Second Circuit relied on NDAA § 1021(e) which states: "Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."

This additional provision, however, contains no statement of what those "authorities" are and because §1022(c) makes no provision for recourse to the civil courts, no means is provided in §1021(e) to facilitate the use of such "authorities". This section is especially unhelpful because the government maintains that existing authority allows it to detain civilians under the AUMF while the plaintiffs here argue the opposite. For this reason, the ultimate disposition of this properly lies in this very Court.

The third reason to vacate the stay is that the Second Circuit misread the

provisions of the NDAA and the district judge's order to mean that the government's entire detention authority is enjoined, including any powers it has under the AUMF. But this is a misreading of Judge Forrest's Order. In contrast to §1021(b) (2) whose undefined terms would enable detention of civilians by the military with no recourse to the civil courts, §1022 is focused on "covered persons" taken on the field of battle or who directly participate in hostile conduct, persons who traditionally would be susceptible of detention by the military as prisoners of war or unlawful combatants. By leaving §1022 intact, Judge Forrest preserved the President's flexibility in detaining combatants taken in the course of hostilities while protecting the rights of U.S. citizens and other persons falling within the protection of the Constitution.

This Court should vacate because the Second Circuit issued the stay despite the fact that Judge Forrest had already issued a preliminary injunction on May 16, 2012 that enjoined the same section of the NDAA that was permanently enjoined by Judge Forrest on September 12, 2012. See Exhibit C, May 16 Opinion. Between May 16 and September 12, 2012 the government never moved for a stay or made any argument that a stay was necessary for national security or any other reason. Therefore, the government's argument that a stay is needed to prevent imminent harm by undermining Executive Power is specious.

This court should vacate the stay because the Executive Branch has made clear that it believes its actions to be beyond judicial review. When Judge Forrest questioned government attorneys about whether they had detained citizens under the NDAA, the government indicated that it does not keep track of what statute they detain people under. This led Judge Forrest to surmise that the Executive Branch

could have been in contempt for violating the preliminary injunction of May 16, 2012. Ex. E, Trial Transcript of Hearing before Judge Forrest on August 7, 2012 at 138-139. ("August 7 Hearing")

The only authority cited by the Second Circuit Court of Appeals in favor of a stay was *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007), which concerned a stay of an action pending resolution of immunity issues, not a constitutional question as to the due process rights of citizens and non-citizens in the United States.[3]

Notably, the Court of Appeals made no finding as to the essential element of a stay application, namely whether "the applicant has made a strong showing that he is likely to succeed on the merits". *In re World Trade Center Disaster Site Litig*., 503 F.3d at 170. The effect of the stay is to permit the United States to detain civilians and citizens in military custody under §1021(b) even though the district court has held the statute to be unconstitutional in a detailed and comprehensive rule. In light of the well-developed record below, the failure of the Court of Appeals to identify the government's likelihood of success as a factor in its stay order requires that the stay be vacated.

Finally, since detention of civilians by the military is not permitted under any other statute – prior to the adoption of §1021(b) no civilian could be held in military

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[3] The Second Circuit entered the stay, in part, because NDAA §1021(e) provides a purported safety net for persons arrested in the United States as follows:

> "Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."

As argued above, this additional provision, however, contains no statement of what those "authorities" are and because §1022(c) makes no provision for recourse to the civil courts, no means is provided in §1021(e) to facilitate the use of such "authorities".

custody – the stay disrupts the long-standing status quo under which such detention has been repeatedly held to be outside of the government's powers.

For these and other reasons set forth below, the stay should not have been granted by the Court of Appeals and it should be vacated by this Court.

## ARGUMENT

Judge Forrest's decision trod no new ground and relies on well-established precedent as to the President's delineated constitutional powers barring military jurisdiction over civilians, a power that has long been denied to the Executive. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521-522 (2004), citing *Ex Parte Milligan*, 4 Wall., at 125, 71 U.S. 2, 18 L. Ed. 281 (1866) (recognizing no governmental power to detain civilians in military custody in the U.S. where the civil courts are "open and available"); *Reid v. Covert,* 354 U.S. 1, 22 (1957) (U.S. citizens abroad are entitled to the protection of the Bill of Rights and cannot be made subject to military jurisdiction). This court should lift the stay because the likelihood is that the plaintiffs will prevail on the merits.

Though the government claimed a chain of precedent arising out of the D.C. Circuit, Judge Forrest's detailed analysis of the absence of such precedent in itself undermines the government's claims to a stay. See Order at 32-45. Indeed, no D.C. Circuit court ever applied the "substantially supporting" standard to *any* AUMF case and the recent decision of that Circuit in *Hamdan v. United States*, 2012 U.S. App. LEXIS 21385 (October 16, 2012) makes it impossible for the government's argument to now be given credence as it effectively rejects the "support" standard in AUMF cases.

Before the Second Circuit, the government argued a stay is necessary because

Judge Forrest's injunction would impair the President's detention powers in Afghanistan. But the district judge did not gratuitously enter her opinion on the scope of the AUMF. Rather, she was forced to do so by the government's defense that plaintiffs lacked standing to challenge §1021(b)(2) because the AUMF had *always* permitted detention based on the "substantially supporting" standard that now appears in §1021(b) and since plaintiffs had never been detained during the 11 years in which the AUMF has been in force they had no basis to now fear detention under this new provision of the NDAA. Judge Forrest noted that such issue was put into play by the government's characterization of the AUMF:

> "[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."

Order at 9.

Fundamentally it is unreasonable for the government to press a defense to standing based upon the alleged scope of the AUMF detention authority and then demand that the resulting adverse decision on the scope of the AUMF be stayed because it may interfere with the President's executive function in some future context.[4] The government is not entitled to a stay of a decision that it invited the district court to make.

[4] In support of this argument, the government grievously miscasts the nature of section 1021(b)(2), contending that section 1021 was passed to "confirm the authority of the President as Commander in Chief under the Authorization for Use of Military Force". While section 1021(a) does contain a provision that "Congress affirms" the authority of the President under the AUMF, this is neither the gravaman of the law nor is it an essential element of the NDAA. To the contrary, the AUMF itself has no sunset clause and section 1021 was not needed to "re-affirm" a statute - the AUMF – that has no terminal date.

A stay should be entered where there is judicial support for the right claimed by the government, but case law is clear in holding that the Executive has *no* constitutional power to place civilians in the U.S. in military custody, *Hamdi* citing *Milligan*, or to extend military jurisdiction over citizens abroad, *Reid v. Covert*, supra, as §1021(b) would allow. By staying the district court's injunction, even on an interim basis pending appeal, the Court of Appeals has thus authorized the President to engage in extra-constitutional forms of detention repeatedly rejected by this Court.

As argued below, the stay should be lifted for the following reasons: 1) the Court of Appeals made no finding that the government was likely to succeed on the merits of the plaintiffs' constitutional challenge; 2) the government cannot be "irreparably harmed" by an injunction that bars the President from undertaking a form of detention that the Constitution forbids; and 3) the stay, if necessary to avoid intrusion in the President's war powers, should have been narrowly tailored to preserve the injunction as to domestic detention.

## I. THE STAY SHOULD BE VACATED BECAUSE THE DISTRICT COURT'S SEPTEMBER 12, 2012 ORDER DOES NOT IMPERMISSIBLY INTRUDE UPON THE PRESIDENT'S DETENTION POWERS UNDER THE AUMF.

The "substantially supported" detention standard, first raised by the government in its March 2009 briefing in *Hamlily v. Obama*, 616 F.Supp. 2d 63 (D.D.C. 2009), was rejected wholesale by that court, 616 F.Supp 2d at 75, and the government later abandoned such standard in the D.C. Circuit, see e.g. *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010). No court since has applied this detention standard. See Point I B, infra. Similarly, the trial court found that use of the "law of war" as a basis for expanding

the AUMF detention authority has been "rejected by multiple courts". Order at 39.[5] *Hamdan* now puts to rest any suggestion that the D.C. Circuit has recognized a widespread detention standard under the law of war.

### A. In Holding That the AUMF Did Not Allow for Detention Under the "Substantially Supported" Standard, Judge Forrest Was Following This Court's Holding In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) That the President Has No Power to Detain Civilians In Military Custody.

Judge Forrest's analysis of the limited nature of the AUMF follows precisely this Court's holding in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi* the Court rejected any executive claim to military detention of civilians where the detainee was not actually "engaged in armed conflict" against U.S. forces. 542 U.S. at 526. *Hamdi* construed the AUMF to be limited in scope and tightly cabined to the arrest and detention of "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,' or who "harbored" such persons. *Hamdi* described the AUMF as being limited to the "narrow circumstances" of preventing "a *combatant's* return to the field of battle." 542 U.S. at 519, 521 [emphasis added].

The *Hamdi* majority held that the AUMF did not allow for detention simply because a "covered person" gave "substantial support" to al-Qaeda, the Taliban or their associates. *Hamdi* stated:

> "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]. Under *Hamdi* "support" for such

[5] Judge Forrest's detailed and scholarly analysis of the absence of such authority in the AUMF appears at pages 34 to 45 of the Order.

groups is one of **two** required legs for AUMF detention; *Hamdi* requires the additional element that the detainee have been "engaged in armed conflict against the United States." *Id.* Since §1021(b) omits this additional standard, it violates *Hamdi* and the stay thereby enables use of a detention standard that this Court has rejected.

The stay effectively amounts to a repudiation by the Court of Appeals of this Court's holding in *Hamdi*. By holding the AUMF does not permit detention merely for "support" of al-Qaeda, the Taliban or their associated forces, Judge Forrest was merely following this Court's decision in *Hamdi* wherein the additional element of actually being *in* "armed conflict with the United States," *id*., is required. Order at 35-36 citing *Hamdi*.[6]

B. Judge Forrest's Holding That The President Has No Power Under the AUMF to Detain Civilians in the U.S. Under the "Substantially Supporting" Standard is Well-Supported by Case Law and Other Authority.

The "substantially supported" standard first emerged in a government brief submitted to the District Court for the District of Columbia in March 2009 in *Hamlily v. Obama*, 616 F.Supp 2d 63, 75 (D.D.C. 2009). *Hamlily* rejected the contention that the AUMF authorized detention of persons taken abroad under the "substantially supporting" standard, rather than the requirement that a detainee be a "part of" al-Qaeda, the Taliban or their associated forces.

*Hamlily* held that neither the AUMF nor the "law of war" provided for detention of civilians under the "substantially supported" standard:

[6] Two years after *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) this Court reiterated the limited scope of detention authority under the AUMF. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court held the AUMF to be so limited in scope, despite its military cast, that it did not even authorize the President to establish what turned out to be the first incarnation of AUMF military commissions. The Court has thus taken a consistent line, followed by Judge Forrest, that the AUMF is limited to the taking of combatants under normal wartime conditions and that it enables no broad detention authority.

> 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 [emphasis added].

What *Hamlily* rejected is the very essence of what the government argued to the Second Circuit in seeking the stay of Judge Forrest's order: that detention authority under AUMF *or* the "law of war" always and necessarily included detention of one who "*substantially supports* such an organization", *id.,* as §1021(b) now provides. On this basis, the government claimed that since the AUMF and the "law of war" *always* included the "substantially supported" detention authority, the district court's injunction of NDAA §1021 intrudes upon a "long-standing" executive power under the AUMF.

If this were true it might bear some weight, 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. Similarly 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, a second judicial rejection of the government's claim that the AUMF allowed broader detention power as to U.S. civilians as now appears in the NDAA. See *Gherebi*, 609 F. Supp.2d at 55 n.7.[7]

No court in the long history of litigation under the AUMF has ever applied the "substantially supported" standard under the AUMF to authorize detention of *any*

[7] 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 at 752, 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.

individual and, subsequent to *Hamlily,* the government itself abandoned such claims before the D.C. Circuit. *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010).

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 detained under the AUMF based on the fact that 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 "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].[8]

Other cases in the D.C. circuit have applied only the "a part of" standard under the AUMF. *Baroumi v. Obama*, 609 F.3d 416, 431 (D.C. Cir. 2010), found that Baroumi was " '*part of* an al-Qaida-associated force and therefore properly detained pursuant to the AUMF.' " [emphasis added]. Accord *In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d 119 (D. D.C. 2010) where the court noted the Government's claim to a "substantially supporting" standard under the AUMF but did not construe such claim as each plaintiff in the class action was a former Guantanamo detainee taken in a *combat* theater abroad.

Through these many years of litigation over the scope of AUMF detention

[8] 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.

authority, the D.C. Circuit has distanced itself from any endorsement of the government's "substantially supported" standard as a basis for AUMF detention.

In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), though the Court acknowledged the Government's claim to the "substantially supporting" standard, it did so in the limited context of an Arab militia member arrested in Afghanistan who "purposefully and *materially* supported" the Taliban by serving as a food vendor to Taliban camps, a vastly different definitional provision than §1021(b)'s "substantially supported" standard.[9] 590 F.3d at 873. Thus, the "substantially supporting" standard was not construed by the *Al-Bihani* court that instead applied the long-standing "*material* support" standard.[10]

It was following *Al-Bihani* that the Government in *Bensayah* abandoned the "substantially supporting" framework. 610 F.3d at 720. No decision since *Bensayah* has relied upon or applied the "substantially supporting" theory of AUMF detention. Accord *Alsabri v. Obama*, 2012 U.S. App. LEXIS 9006 (D.C. Cir. 2012); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1073-1074, citing Al-Bihani ("We have held that the authority conferred by the AUMF covers at least 'those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in

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[9] *Al-Bihani* also 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 the NDAA detention authority to be unconstitutional.

[10] 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].

hostilities against U.S. Coalition partners.' "); see also *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 "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). Each of these decisions substantiates the claim to detention under the AUMF on the "*materially* supported" standard, not the "substantially supported" standard.[11]

On October 16, 2012, the D.C. Circuit even rejected AUMF detention under the "*material* support" standard. In *Hamdan v. United States*, 2012 U.S. App. LEXIS 21385 (D.C. Cir. October 16, 2012) the D.C. Circuit held that the "law of war" did not authorize prosecution under the AUMF for "material support" of terrorist groups. Holding that "There is no international-law proscription of *material* support for terrorism", the Court held that the AUMF and the "law of war" did not authorize prosecution by military commission under the material support standard. *Hamdan*, 2012 U.S. App. LEXIS 21385 at 31-32.

The D.C. Circuit's recent decision in *Hamdan* effectively wipes out the

[11] In contrast to the undefined term "substantially supported" in §1021(b), the term "materially supported" is well-known in domestic civil law as it appears with extensive definitions in the Anti-Terrorism and Effective Death Penalty Act, 18 U.S.C. §§ 2339A-2339B. Section 2339A, originally passed in 1994, and modified on numerous occasions between then and December 2009, prohibits the "knowing" provision of *material* support or resources to a foreign terrorist organization. Id. § 2339A(a). This statute has been refined several times over the years and now contains a comprehensive statutory scheme that defines key terms, such as what constitutes "material support". See id. § 2339A(b)(1). As Judge Forrest noted the term "substantially supported" in the NDAA has no statutory definition and because only the "a part of" detention theory has been applied by the courts, the term "substantially supported" has never been defined judicially. Thus, the government's claim that Judge Forrest erred in finding the provision to be vague is incorrect since the term "substantially supported" has no judicial or statutory definition.

government's basis for the stay pending appeal. Since neither the "law of war" nor the AUMF provide for military detention under the *material* support standard, *Hamdan*, supra, neither can they provide for military detention based on the lesser "substantially supported" standard. Hence, since the President never had the power to detain under the AUMF using the "material support" standard it follows that he never had the authority to detain under the "substantially supported" standard and Judge Forrest's order cannot be deemed to have intruded improperly into the Commander-in Chief's powers.

Paradoxically, the stay order is also contrary to the Second Circuit's own holding in *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) where the Court held that the AUMF did *not* contain the "specific Congressional authorization" required to overcome the Non-Detention Act, 18 U.S.C. § 4001(a), which precludes the detention of American citizens on American soil. In so holding, *Padilla* rejected directly the claim by the United States that the AUMF conveyed to the President the power to detain persons on U.S. soil who were non-combatants:

> "The plain language of the Joint Resolution [the AUMF] contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by section 4001(a) [the non-detention act] and the "clear," "unmistakable" language required by *Endo*."[12]

352 F.3d at 723. *Padilla* further noted that the AUMF conveyed *no* implied power to the President to detain individuals on U.S. soil who are taken in the U.S. and not engaged against U.S. forces:

> While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress

[12] *Ex parte Mitsuye Endo*, 323 U.S. 283, 298-300 (1944)

> believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not "arrayed against our troops" in the field of battle. *Hamdi III,* 316 F.3d at 467.

*Id*.[13]

Legislative history of the AUMF also makes it clear that the AUMF does *not* authorize military detention of civilians on U.S. soil. In Congressional debates at the adoption of the AUMF, even proponents of the enactment complained that the AUMF 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. *Padilla v. Rumsfeld*, 352 F.3d at 723, n.31 [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].

Based on this record, Judge Forrest's conclusion that the AUMF did not permit detention of U.S. citizens or civilians in the U.S. is well supported not only by the precedent construing the AUMF but by the Congressional debate at the time of its adoption. No proper basis to stay such ruling was presented by the Government before the Second Circuit.

As her detailed analysis shows, Order at 32-45, Judge Forrest's decision stands on solid precedential ground in holding that the AUMF never included such detention authority as is now contained in §1021. Order at 9-11.[14] In the absence of any

[13] Although *Padilla* was reversed on the ground that the plaintiff had sought habeas relief in the wrong judicial district, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), this Court left undisturbed the Second Circuit's interpretation of the absence of domestic military detention authority in the AUMF.

[14] Out of the long litany of cases concerning the AUMF, the government referred to two decisions for the proposition that the "substantially supported" theory of detention has been upheld by the courts. Neither support the government's premise that §1021(b)

substantive authority to the contrary, there was no basis to stay her well-developed opinion on the limited scope of the AUMF.[15]

C. The Second Circuit Court of Appeals Erred by Deferring to the Executive's Expansive "Interpretation" of the President's View of his Detention Powers as to U.S. Citizens or on U.S. Soil.

*Hamdi v. Rumsfeld* rejects outright any claim that the courts must defer to the executive branch in matters concerning detention by the military. In reaching this conclusion, *Hamdi*, citing *Ex Parte Milligan*, 4 Wall., at 125, 71 U.S. 2, 18 L. Ed. 281 (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*. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.

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merely imports a long-recognized detention authority from the AUMF. The first, *Parhat v. Gates*, 532 F.3d 834, 837-38 (D.C. Cir. 2008), mentioned the government's March 2009 briefing in passing in a case concerning a Chinese national who was detained in Pakistan after having fled from a Urghur camp in Afghanistan and was found to be "an enemy combatant". 532 F.3d at 838. The second decision, *Al-Bihani v. Obama*, 590 F.3d 866, found that the detainee had "engaged in hostilities against a U.S. Coalition partner", 590 F. 3d at 873, and did **"**materially support such forces". *Id*. Neither *Parhat* nor *Al-Binhani*, nor any other decision cited by the government, has ever applied a "substantially supporting" standard of detention and never to civilians as §1021(b) would now permit.

[15] 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 Order 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.")

> *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 its exchanges with other nations or with enemy organizations 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].

Two years later in *Hamdan v. Rumsfeld*, this Court, citing *Ex parte Quirin*, recognized that "*Quirin* provides compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 548 U.S. 557, 588-589 (2006). *Hamdan* holds in essence that where the military purports to impose jurisdiction over a civilian, judicial review is inherent and the "obligations of comity" provide no basis for the court to abstain. *Hamdan*, 548 U.S. at 587-590.[16]

Thus, the Supreme Court has *twice* under the AUMF rejected the argument that the courts must play a highly deferential role where detention issues out of the President's powers as Commander-in-Chief.

President Obama in signing §1021(b) into law stated that the authority to interpret Executive power rests with the Article III courts. In his signing statement for the NDAA, he stated that "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*." See

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[16] *Hamdan* rejected a comparison with *Johnson v. Eisentrager*, 339 U.S. 763, 789, n.14 (1950), where the Court had suggested in dictum that claims arising on the battlefield under the Geneva Convention were outside of the purview of the judiciary. See *Hamdan* at 626 citing *Eisentrager,* 339 U.S. at 789 n. 14. To the contrary, *Hamdan* held that because the plaintiff's claims arose under domestic law, namely the law of war as imported into the Uniform Code of Military Justice, *Hamdan* concerned issues arising under the Constitution as to which conventional judicial review was properly applied, regardless of the relationship to the President's war making powers.

Presidential Signing Statement, National Defense Appropriate Act of 2011 [emphasis added].

This is hardly a new doctrine. In *Johnson v. Eisentrager*, 339 U.S. 763, 790 (1950), this Court recognized that the judicial power is "unquestioned" as to detention of "persons both residing and detained within the United States". *Eisentrager,* relying on *Ahrens v. Clark,* 335 U.S. 188 (1948) and *Ex parte Endo*, 323 U.S. 283 (1944), distinguished combatants captured abroad from detention of citizens and even enemy aliens residing in the U.S., as to whom *Eisentrager* held there could be *no* military jurisdiction. In *Ahrens* this Court dismissed the enemy aliens' habeas petition because the plaintiffs sought relief in the wrong judicial district but never questioned their right to seek federal judicial relief despite the fact that their detention was in consequence of the President's war powers. *Eisentrager* later endorsed this holding. *Eisentrager*, 339 U.S. at 790.

In *Endo*, the Court rejected the Executive Branch's detention authority over a U.S. citizen of Japanese extraction who had been detained under military internment orders that had been ratified by Congress (similar to the claim that the government makes here that the NDAA is a Congressional endorsement of the President's war powers). The Court in *Endo* still asserted direct jurisdiction over the application, adjudicating it on the merits and ordering that the plaintiff be released as a loyal citizen.[17]

[17] Significantly, the detention authority construed in *Ex parte Endo* was administered by a civil agency and Congress, in the Act of March 1942 ratifying the military orders had expressly reserved recourse to the citizen detainee to the civil courts to challenge detention, a procedural and constitutional protection that Congress has omitted from §1021(b).

As case law shows, this Court, through *Hamdi* and *Hamdan*[18] has twice rejected the primary argument advanced by the government in support of the stay, i.e., that §1021 falls within the President's war making powers and is beyond judicial review. This doctrine has never been accepted by this Court and 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 Order at 70-82.[19]

D. 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.

A stay of the injunction can only be justified if the President will be "irreparably harmed" by the injunction of the detention power under §1021(b). Yet the President cannot be "irreparably harmed" by Judge Forrest's injunction because he has *never* had

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[18] *Hamdan's* majority holding rejected claims by the dissenters 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). It is essentially this same argument advanced by the government here, repeated in endless incarnations anytime a question touching upon national security is raised, that the courts must refrain from acting even in the face of blatantly unconstitutional enactments.

[19] The government mischaracterizes those decisions that it claims stand for the proposition that no injunction over a statute should issue until the matter is resolved by the Supreme Court. Citing *Turner Broad. Sys. v. FCC*, 507 U.S. 1301 (1993) the government omits to mention that *Turner* was not a decision of the full Court but a refusal by the Chief Justice, acting alone as Circuit Justice, to enjoin enforcement of a statute that the lower court had found *was* constitutional. 507 U.S. at 1302. Nowhere in *Turner* did Justice Rehnquist make the extraordinary ruling that a statute found to be unconstitutional by the trial court should continue in force until the Supreme Court hears the case. Similarly, in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), Justice Black, also sitting as Circuit Justice, refused to enjoin the statute after the district court had upheld the civil rights law. Unlike both *Heart of Atlanta* and *Turner*, here the statute has already been declared to be unconstitutional, a material distinction from the single-Justice decisions cited by the U.S. In fact, every decision cited by the government for the proposition that no injunction may remain in force until after the Supreme Court has heard the matter involved, not decisions of the full Court, but decisions by a single Justice sitting as Circuit Justice. None of these decisions supports the extraordinary proposition that no injunction of an unconstitutional statute may lie until the high court hears the matter.

the power under the Constitution to detain civilians in military custody that §1021(b) would permit. *Four times* this 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.[20]

In *Hamdi* the Court iterated yet again the long-standing principle that the Executive has *no* military detention power over civilians. For this proposition, *Hamdi* cited *Ex parte Milligan*, 71 U.S. 2 (1866), where the 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. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

*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) thus authorizes a power that is constitutionally denied the

[20] Even in the Japanese internment cases during wartime when the country had been invaded and attack, *Endo*, supra, the detainees were subject only to civil detention, not military custody. *Endo*, 323 U.S. 283.

President, as this 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. As *Milligan* itself held, civilians arrested outside the theatre of combat cannot be tried or detained by the military courts "when the courts were open and ready to try them." *Ex Parte Milligan*, 71 U.S. 2, 127 (1866).[21] *Hamdi* adopts this holding unequivocally, *Hamdi*, 542 U.S. at 522, and the Second Circuit's stay of such injunction contravenes this Court's decisional law.[22]

E. Congress Lacks Power Under the Necessary and Proper Clause to Extend Military Jurisdiction Over Civilians.

*Hamdi,* by barring the detention of civilians in military custody, made no new law, resting on the Court' earlier reasoning in *Reid v. Covert*, 354 U.S. 1 (1957), where the Court also held that the power to regulate the armed forces does not give Congress the 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 its Art. I, §8, Cl. 14 power to "make rules for the Government and Regulation of the land and naval Forces" as a basis

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[21] *Milligan* went on to note:

> "*All other persons*, citizens of states where the courts are open, if charged with crime, *are guaranteed the inestimable privilege of trial by jury*."

[emphasis added]; accord *Reid v. Covert*, 354 U.S. 1 (1957).

[22] 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.

on which to extend military jurisdiction over civilians. Of special significance is *Reid's* recognition that the power to impose military jurisdiction under the Necessary and Proper Clause is subordinate to the Bill or Rights, as Judge Forrest also concluded. In other words, Congress despite its power to regulate the military under Art. I, §8 Cl. 14, may not extend such authority over civilians in derogation of their right to trial by jury before the civil courts.

*Reid* is definitive in holding 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) thus, authorizes precisely what *Reid* said is beyond Congress's constitutional powers.

As this case law makes clear, §1021(b) is in violation of "the deeply rooted and ancient opposition in this country to the extension of military control over civilians". *Reid* at 33. In this respect the permanent injunction did nothing other than assert this Court's well-trod prior holdings. *Hamdi* holds that such detention authority is outside of the President's powers as Commander-in-Chief, while *Reid* makes it clear that Congress lacks power under the "Regulation" clause, Art. I, Sec. 8, Cl. 14, to authorize military detention of civilians. Judge Forrest's conclusion that the AUMF detention authority over civilians is a power *not* available to the President or Congress – and, for the same

reasons, that §1021(b) is unconstitutional – fits directly within this well-established line of precedent. Order at 33-45.

*Hamdan v. Rumsfeld* held that even "exigencies of war" will not substantiate the 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 unless some other part of that document authorizes a response to the felt need. 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. See *id.*, at 26-29, 63 S. Ct. 2, 87 L. Ed. 3; *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) is drafted in terms that permit the government to impose 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 that is directed at combatants. As case law makes clear, the sole and singular constitutional basis for the imposition of military jurisdiction over civilians arises only where the civilian is arrested in a theatre of combat and 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 the imposition of military jurisdiction.[23]

[23] Further, her conclusion that only a person "engaged in armed conflict with the United States" can be subject to military detention comes directly from this Court's holding in *Hamdi.* Order at 35 citing *Hamdi*, 542 U.S. at 526.

In the end, since neither the President nor Congress has the constitutional authority to impose either marital law or military jurisdiction over civilians absent circumstances where the courts are "actually closed"[24] – even under the AUMF as both *Hamdi* and *Hamdan* make clear – the President, at least within the domestic territory of the United States, has *never* had the authority conveyed under section 1021(b) as to U.S. citizens anywhere and as to civilians in the U.S. Since the President has never had the power that Judge Forrest enjoined under §1021(b), he cannot be "irreparably harmed" by an injunction prohibiting him from doing what the Constitution forbids and what the Supreme Court has four times rejected.[25] At the very least, the injunction, following this undisputed case law, a stay of Judge Forrest's *entire* order was inappropriate as the order should plainly remain in force within the domestic territory of the United States.

F. Law of War Detention Cannot Be Extended to Civilians Outside of a Theatre of Combat.

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[24] President Obama himself – a former professor of constitutional law – seemed to accept the moral force of such case law when he declared his discomfort as to the implications of the NDAA. In a statement released by the Executive Office of the President, on November 17, 2011, he issued a statement on the NDAA, stating:

> applying this military custody requirement to individuals inside the United States, as some Members of Congress have suggested is their intention, would raise serious and unsettled legal questions and would be inconsistent with the fundamental American principle that our military does not patrol our streets.

*Accord*, Alexander Hamilton, "Federalist No. 8," in The Federalist Papers, ed. Clinton Rossiter (New York: New American Library, 1961), p 69 ("The laws are not accustomed to relaxation in favor of military exigencies;")

[25] Even Justice Thomas in his dissent in *Hamdan* conceded that the purpose of the AUMF was to enable the President through the military to try "enemy belligerents", *Hamdan*, supra, (Thomas, J. dissenting at n.5), not civilians.

To sustain §1021(b), the government focused heavily on the claim that the "Law of War" enables broad based detention authority under the "substantially supported" standard in §1021(b) and that "the district court failed to recognize this *key to understanding the AUMF and the NDAA*." But the district court merely followed the governing jurisprudence that restricts the application of Law of War detention to combatants and does not extend it to civilians.

In *Hamdan v. Rumsfeld*, this Court recognized that the laws of war apply *only* to persons who are either engaged in combat or are members of a combatant force. Citing the leading authority on Law of War detention, Colonel William Winthrop, whom the Court called the "Blackstone of Military Law", *Hamdan*, 548 U.S. at 597-598, citing *Reid v. Covert*, 354 U.S. 1, 19, n. 38, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), the Court in *Hamdan* described the "preconditions" necessary "for exercise of jurisdiction by a tribunal of the type convened to try Hamdan."

Under the law of war, a military commission has jurisdiction for "offences committed within [a] theatre of war". *Hamdan*, 548 U.S. at 597-598. *Hamdan* held further that in the absence of either martial law or occupation, a military commission may only try "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war". *Id.*, at 598. Neither of these pre-conditions are included in §1021(b)'s invocation of the law of war, *Hamdan* supra citing *Reid* at 839, a further statutory defect supporting Judge Forrest's injunction.[26]

[26] In a significant footnote, *Hamdan* held that under the traditional common law of war, such a proceeding cannot take place where the civil courts are "open and available":

> "the trial must be had within the theatre of war…;…if held elsewhere, and *where the civil courts are open and available*, the proceedings and sentence will be coram non judice." *Hamden* at n. 29.

By failing to predicate its military detention authority on an offense committed in a combat theatre, see *Hamdan*, supra, §1021(b) purports to do precisely what *Hamdan* said it cannot, places civilians into military jurisdiction without a prior violation of the law of war of the commission of a war crime. Viewed from the vantage of this clear and extensive precedent, it is not Judge Forrest's opinion that is "unprecedented" but rather it is the imposition of military power over the civilian that Congress has expressed through §1021(b) that breaks with traditional constitutional norms.

## II. JUDGE FORREST'S ORDER DOES NOT INTERFERE WITH THE PRESIDENT'S MANAGEMENT OF "ACTIVE HOSTILITIES" NOR WAS SUCH THE RELIEF THAT PLAINTIFFS SOUGHT IN THE TRIAL COURT.

Among its reasons for seeking to stay the permanent injunction, the government contended that the order interferes with the President's "conduct of military operations abroad during an active armed conflict". This argument is manifestly incorrect. The permanent injunction is directed only to §1021(b) that would permit detention with*in* the United States. The trial court was careful to leave unimpaired §1022 that governs detentions *outside* the U.S., as well as the AUMF.

The district court's order confirms that the only statute that has been enjoined is §1021(b). The Order states:

> "If, following issuance of this permanent injunctive relief, the Government detains individuals under theories of 'substantially or directly supporting' associated forces, *as set forth in § 1021(b)(2),* and a contempt action is brought before this Court, the Government will bear a heavy burden indeed"); Order at 14

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*Hamdan* thus reiterates the essential formula of *Milligan* that civilians may not be kept in military jurisdiction where the civil courts "where the civil courts are open and available" and that military adjudications in such conditions will be void, "corum non judice", *Id.,* meaning for lack of jurisdiction.

and

> ("[m]ilitary detention based on allegations of 'substantially supporting' or 'directly supporting' the Taliban, al-Qaeda or associated forces, is not encompassed within the AUMF and is enjoined by this Order *regarding § 1021(b)(2)")*. Order at 112.

As the highlighted sections indicate, Judge Forrest's injunction is limited to §1021(b)(2) and no other provision. The district court order does not implicate the government's detention authority under the AUMF as to combatants or under §1022 that expressly enables detention on the battlefield or as to persons taken in the course of hostilities. Judge Forrest explicitly stated the AUMF remains in force with respect to those who actually had "engaged in terrorist activities":

> "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."

Order at 45.

Judge Forrest acknowledged the Executive's power to enforce the federal government's wide range of anti-terrorism laws:

> "Congress has provided the executive branch with ample authority to criminally prosecute those engaged in a wide swath of terroristic or war-making behavior;"

Order at 52. She also recognized the enormous range of statutory tools available to the government beyond §1021(b) that are not subject to any injunction:

> "18 U.S.C. §§ 2339A-2339B has been used to charge more than 150 persons. Holder, 130 S. Ct. at 2717. For example, on May 24, 2012, Minh Quang Pham was indicted under 18 U.S.C. § 2339A(b)(1) for providing material support to a foreign terrorist organization. The specific overt act charged against Pham is working with a U.S. citizen to create online propaganda for al-Qaeda, in furtherance of the conspiracy. Sealed Indictment ¶ 3(c), United States v. Pham,

No. 12 Cr. 423 (AJN) (S.D.N.Y. May 24, 2012).25

> In addition to 18 U.S.C. § 2339A-2339B, there are numerous criminal statutes available to prosecute and bring to justice those who commit illegal acts furthering war or acts of terrorism against the United States or its interests, including 18 U.S.C. § 2381 (the modern treason statute); 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); 18 U.S.C. § 2332a (use of weapons of mass destruction); 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries); 18 U.S.C. § 2382 (misprision of treason); 18 U.S.C. § 2383 (rebellion or insurrection); 18 U.S.C. § 2384 (seditious conspiracy); 18 U.S.C. § 2390 (enlistment to serve in armed hostility against the United States); and 50 U.S.C. § 1705(c) (prohibiting making or receiving of any contribution of goods or services to terrorists)."

Order at 48.

Faced with this extensive recognition of the terror-fighting tools available to the U.S., and her explicit acknowledgment of the continued enforceability of the AUMF, leaving intact §1022 that enables combatant detentions, by no means can Judge Forrest's order be said to impermissibly limit or intrude upon the Executive's ability to fight terrorism and a stay of such order is inappropriate.

## III. THE DISTRICT COURT PROPERLY ENJOINED THE PRESIDENT FROM CARRYING OUT AN UNCONSTITUTIONAL ENACTMENT IN THE FORM OF NDAA §1021(B).

In its stay application the government, without citing *any* authority, makes the curious and extraordinary argument that neither the President nor the Secretary of Defense can be enjoined from carrying out an unconstitutional detention law. Relying entirely on two inapposite cases, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) and *Mississippi v. Johnson*, 4 Wall. 475, 4980499 (1867), the government suggests that no federal court can ever place the president or his cabinet member under an injunction barring enforcement of a statute. No case law sustains this extraordinary proposition that would denude the judiciary of virtually all power as to the political branches.

*Franklin v. Massachusetts* does not support the government's position. *Franklin* concerned whether the President was subject to the Administrative Procedure Act (APA), a statutory structure that enables judicial review of arbitrary and capricious agency acts. Holding that the President was not an "agency" for purposes of the APA, the Court held that his decision on reapportionment of Congressional seats was not subject to the arbitrary and capricious standard under the APA. *Franklin* never made the blunderbuss ruling urged by the government before the Second Circuit that the President is *never* subject to injunctive relief.

To the contrary, the majority in *Franklin* held that the reapportionment determination *was* subject to "constitutional review" by the court and acknowledged that injunctive relief *is* available against the President but determined it to be unnecessary since "declaratory relief" as to the Secretary of Commerce would be sufficient for purposes of redressibility. The Court stated:

> "[W]e need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone."

*Franklin v. Massachusetts*, 505 U.S. at 803. Thus, far from supporting the government's position, *Franklin* confirms that injunctive relief *is* available against the President *and his cabinet*.[27]

Similarly, in the district court holding in *Padilla v. Rumsfeld*, 233 F. Supp. 2d 564 (S.D. N.Y. 2002), construing detention authority under the AUMF, the district court noted

[27] Relying upon Justice Scalia's comment that "no court has ever issued an injunction against the President himself", the government fails to point out to the Court that the majority in *Franklin* did not adopt such dictum and it appears only in Justice Scalia's concurrence. 505 U.S. at 827.

that injunctive relief against the President would not be appropriate to compel a change in Padilla's detention classification because an order directed *against the Secretary of Defense* could afford redressibility:

> "In this case, as in *Franklin*, the necessary relief, if any, may be secured by an order to the Secretary alone, and the President can be dismissed as a party."

*Padilla v. Rumsfeld*, 233 F. Supp 2d at 583.

Clearly then, even if the President is, *arguendo*, improperly joined to the injunction, the Secretary of Defense <u>is</u> a proper party and Judge Forrest's injunction should not have been stayed as to the cabinet officer.[28]

In *Nixon v. Fitzgerald*, 457 U.S. 731, 754 the Court agreed that the President cannot be enjoined "in the performance of his *official* duties" [emphasis added] but that he *is* subject to judicial restraint against unconstitutional acts. *Id.* *Fitzgerald* noted the court will look to "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 754. *Mississippi v. Johnson*, 4 Wall. at 501.

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[28] *Mississippi v. Johnson* is contorted by the government to seemingly bar relief where no such rule was intended. *Mississippi* concerned an attempt by a state to bar President Johnson's carrying out of the Reconstruction Acts but no judicial holding had been made that the Act was unconstitutional and the Court's refusal to issue the injunction must be seen as a refusal to interfere with the President's carrying out of a statute that was in force, i.e., his "official duties". As the Court later explained in *Rogers v. Lodge*, 458 U.S. 613 (1982), *Mississippi* concerned an attempt to bar the President from affirmatively performing his official duties: "The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion." *Rogers v. Lodge*, 458 U.S. at 634, n. 5; accord *Colegrove v. Green*, 328 U.S. 549, 556 (1946), explaining that the rule of Mississippi applies where the issue is the "political" question of compelling the President to implement a public policy. In contrast, Judge Forrest's order prohibits the President from implementing a specific statutory mandate that the Constitution bars, a vastly different legal animal from seeking to force the President to carry out a statutory policy as was at issue in *Mississippi* and *Colegrove* that is generally beyond the power of the courts to compel.

But the court cannot "balance the constitutional weight" of the claim against "the dangers of intrusion on the authority and functions of the Executive Branch", *id.*, where the President is silent at trial as to any such "dangers" and refuses to offer any testimony or evidence as to the intrusion into executive "authority and functions". *Id.* See Order at 28-29, 109, 112 ("The Government did not present any witnesses or seek to admit any documents"; The Government did not put forward any evidence at trial that it needed the statute for law enforcement efforts;").

In determining such balance "the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing *its constitutionally assigned functions*." *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 443 (1977), citing *United States v. Nixon*, 418 U.S. 683, 711-712 (1974) [emphasis added].

But the President has no "constitutionally assigned functions," *Nixon v. Adm'r of General Servs.*, 433 U.S. at 443, to place civilians in military custody within the United States, as a host of decisions have made clear. As *Milligan* and *Hamdi* both hold, the President's war powers, while extensive, are not consonant with the imposition of military jurisdiction over civilians in the United States. Consequently, any injunction barring the execution of such power does not intrude unduly into the President's "constitutionally assigned functions" since he has no constitutional power to place civilians in military custody.

Moreover, the power to wage war is not a personal power of the President. As Justice Douglass observed in his concurrence in *New York Times Co. v. United States*, 403 U.S. 713 (1971),

> [T]he war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "to declare War." *Nowhere are*

*presidential wars authorized.*

403 U.S. at 722, Douglas, J. (concurring) [emphasis added]. Consistent with Justice Douglass's concurrence, the Supreme Court in *Reid v. Covert*, 354 U.S. 1 (1957), has held that imposition of military jurisdiction over any person is a factor, *not* of the President's personal powers, but of Congress's war power under Art. I., §8. In *Reid* the Court held that such jurisdiction is both "very limited and extraordinary" and is "derived from the cryptic language in Art. I, §8…" *Reid*, 354 U.S. at 21.

Art. I, §8 is a delegation of power to Congress, not the President and, as *Reid* held, the power to impose military jurisdiction is, therefore, a power that derives from the *Legislative* Branch, not the Executive. Looked at from this perspective, Judge Forrest's order does not intrude with the President's power as Commander-in-Chief because the power to detain a person in military custody derives from the legislative power in Article I, a power of Congress, *Reid,* supra, not the Executive.

The government's argument against a "worldwide injunction" is also belied by the holding in *Reid v. Covert* in which the Court held that U.S. citizens abroad, even when associated with the military, are not deprived of the protection of the Constitution or of the Bill or Rights. *Reid* rejects outright the suggestion that "constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him. As we have said before, such a view of the Constitution is erroneous." *Reid*, 354 U.S. at 33

Thus, an injunction of an unconstitutional detention statute *outside* the U.S. is presumptively valid and proper as to U.S. citizens. Here again, Judge Forrest broke no new ground in barring detention of citizens outside the U.S. under §1021(b).

The district court set out an extensive holding as to why and how §1021(b)

implicates speech concerns. Order at 82-86. Weighed against this on the motion for a stay is the government's bald statement that §1021(b) is "a grant of general war powers" and "does not even mention any form of expression…".

Indeed, the trial court concluded that while §1021(b) has a legitimate anti-terror purpose "its breadth also captures a substantial amount of protected speech and associational activities." Order at 84. Judge Forrest compared §1021(b) to 18 U.S.C. §§ 2339A/B, the Anti-Terrorism and Effective Death Penalty Act that contains a specific provision protecting First Amendment activity that is wholly absent in §1021. If §1021 is not intended to impact speech concerns, the district court wrote, "why not have a 'saving clause' as in 18 U.S.C. §§ 2339A/B? Why not have said plainly, 'No First Amendment activities are captured within § 1021?'" *Id.*

Judge Forrest noted the government's repeated reluctance to give any true assurance that plaintiffs' First Amendment activities would not invoke §1021 detention. Order at 29-30, 84-85. In its stay application, the government offered no credible basis to dispute the district court's finding that the plaintiffs have been chilled in their exercise of their First Amendment rights because of fear of the untrammeled impact of §1021 on their extensive journalistic and advocacy activities. As the findings of fact demonstrate, Order at 15-28, the plaintiffs are engaged in extensive conduct that may reasonably be said to be within the unbridled and undefined scope of §1021(b). Whatever arguments the government may raise on the merits on this appeal, on this stay motion it failed to demonstrate that Judge Forrest's detailed discussion of standing is without substantive support. See Order at 15-28, 52-65.

## IV. THE MOTION FOR STAY WAS NOT PROPERLY BEFORE THE SECOND CIRCUIT UNDER F.R.A.P. 8 AND THUS SHOULD NOT

HAVE BEEN GRANTED.

This Court should vacate the Second Circuit stay because the government's motion did not comply with Rule 8 of the Federal Rules of Appellate Procedure (F.R.A.P.) and the rules clearly contemplate that an appellate court can only entertain an application for a stay after the District Court has ruled on the stay motion. F.R.A.P. 8(a)(2)(A)(ii) requires that any motion "state that, a motion having been made, the district court denied the motion…"

The district court below never ruled on the government's motion for a stay pending appeal because the Government insisted to the District Court judge that if the judge did not grant an interim stay, it would immediately seek an interim or administrative stay from the Second Circuit Court of Appeals. This demand was made by letter on Friday, September 14, 2012 after Judge Forrest granted a permanent injunction on Wednesday, September 12, 2012.

Though Judge Forrest denied the government's request for what the government originally in its papers described as an "interim" stay (subsequently characterized as an "administrative" stay) of the injunction, Judge Forrest issued an order by email on Friday, September 14th informing the government and all parties that she would decide the government's motion for a stay pending appeal on Wednesday, September 19, 2012 and setting a briefing schedule for all parties. Judge Forrest's email order follows:

> *In light of the holiday, the Court will issue an order on the motion for a stay on Wednesday [September 19, 2012]*
>
> *If plaintiffs plan to respond to the motion they should do so no later than 3pm Tuesday.[September 18, 2012] The Court is aware of the holiday (obviously) and that some of plaintiffs counsel may be observing it, but the Court still requests a response by 3pm Tuesday.*

After neglecting to inform the Second Circuit of that development, the government sought both an administrative stay and a stay pending appeal from the Second Circuit, which granted an interim stay on September 17, 2012. Because of the government's action and the Second Circuit's decision, Judge Forrest concluded that she could not rule on a stay pending appeal. Because the stay was never ruled on below, it was premature for the Second Circuit to rule on it.

## V. THE GOVERNMENT PRODUCED NO EVIDENCE, AS REQUIRED BY F.R.A.P. 8 (A) TO EITHER THE SECOND CIRCUIT OR THE COURT BELOW AND THEREFORE THE STAY SHOULD NEVER HAVE BEEN GRANTED AND MUST NOW BE VACATED.

Rule 8 of the Federal Rules of Appellate Procedure requires that in an application for a stay, affidavits must be filed setting forth the basis of the requested relief. The rule presumes that evidence under oath or declaration will be submitted by the movant.

No affidavits were filed in the District Court by the government either on the merits or as to the stay application and Judge Forrest's denial of the interim stay must be seen in light of the absence of any evidence offered by the defendants as to the factual basis of the claim of irreparable harm that they failed to buttress either at trial or on the stay application. Since affidavits or declarations are required to support any such motion, and since none were filed with the District Court, it is not even clear that the government properly exhausted its remedy to seek a stay with the originating trial court. At no point in time has the government entered any affidavits into evidence, called any witnesses or offered any evidence as to why "irreparable" harm would befall the Executive Branch. See Order at 28-29, 111 ("The Government did not put forward any evidence at trial that it needed the statute for law enforcement efforts; in contrast, plaintiffs did present evidence that First Amendment rights have already been harmed and will be harmed by

the prospect of 1021(b)(2) being enforced.")

On the other hand, the record below is replete with evidence as to how substantive First Amendment rights are at risk from the NDAA; the District Court judge ruled this substantial body of testimony and evidence "credible" and ruled that absent an injunction, plaintiff's and the public's First Amendment and Due Process rights could not be adequately protected. The government has made no showing to justify setting aside this "credible" body of evidence.

## VI. THE GOVERNMENT HAS NOT MET THE SUPREME COURT'S STANDARDS FOR A STAY.

The government has not met the standards for a stay in the Second Circuit or in the Supreme Court. If anything, the full record shows that the Second Circuit's stay of the injunction will continue the substantial chill of plaintiffs' constitutional rights to freedom of speech, association and due process, and that the public interest lies in protecting same.

### A. The Standard For A Stay In The Second Circuit and In The Supreme Court.

*SEC v. Citigroup Global Markets*, 673 F.3d. 158 (2d Cir. 2012) sets forth the criteria for a stay pending appeal in the Second Circuit:

1. Whether the stay applicant has made a strong showing that he is likely to succeed on the merits.
2. Whether the applicant will be irreparably injured absent a stay.
3. Whether issuance of the stay will substantially injure the other parties in the case.
4. Where the public interest lies.

This Court in *Nken v. Holder,* 556 U.S. 418, 434 (2009) cautions that a right to a stay does not exist simply because a movant is irreparably harmed; and further, that the burden is on the movant at all times to establish that a stay is warranted given an

individualized balance of the factors according to the particular case. *Id,* at 1760-61 (citing *Virginian Ry. Co v. United States.,* 272 U.S. 672, 673; *Hilton v. Braunskill,* 481 U.S. 770, 777("[T]he traditional stay factors contemplate individualized judgments in each case"); *See*, *e.g., Clinton v. Jones,* 520 U.S. 681, 708 (1997); *Landis v. North American Co.,* 299 U.S. 248 (1936)).

The required degree of likelihood of success on the merits varies according to the assessment of the other three factors. *Hilton,* at 101. Where there is lower quantum of irreparable injury to the movant if a stay is denied, then a higher showing of likelihood on the merits is required. *See id*. The inverse is also true. *See id*.

The Supreme Court finds particularly important the first two factors: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; and (2) whether the applicant will be irreparably injured absent a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). ("It is not enough that the chance of success on the merits be better than negligible.") (citing *Sofinet v. INS,* 188 F.3d 703, 707 (C.A.7 1999). "By the same token, simply showing some possibility of irreparable injury fails to satisfy the second factor", (citing *Abbassi v. INS,* 143 F.3d 513, 514 (C.A.9 1998)). In weighing these first two factors, Justice Kennedy, writing for the concurrence in *Nken*, opines that courts are restrained from "…dispens[ing] with the required showing of one simply because there is a strong likelihood of the other. *Nken v. Holder*, 556 U.S. 418, 438 (2009) (Justice Kennedy, with whom Justice Scalia joins, concurring.)

There is a "heavy burden" on the movant because the court will not even consider likelihood of success on the merits if he has not first met his burden for establishing irreparable harm. *See id.* (citing *Ruckelshaus v. Monsanto Co.,* 463 U.S. 1315,

1317(1983) (Blackmun, J., in chambers) ("[L]ikelihood of success on the merits need not be considered ... if the applicant fails to show irreparable injury from the denial of the stay")). As set forth herein, the government is not irreparably harmed by the injunction because the President has never had the power to detain civilians in military custody.

### B. Movants Have Admitted They Cannot Show A Likelihood Of Irreparable Harm.

The stay of a district court's injunction pending appellate disposition is one of the most extraordinary remedies that an appellate court may issue. *See* John Y. Gotanda, *The Emerging Standards For Issuing Appellate Stays,* 45 Baylor L. Rev. 809, 809 (1993). A stay is imposed without a full hearing on the merits, yet it has the effect of suspending the action that preceded it. *Id.* It is especially extraordinary when absent the injunction, the non-movants' constitutional rights to free speech and association are at stake.

The preliminary injunction was first issued by the District Court on May 16, 2012. The permanent injunction issued Wednesday, September 12, 2012 is identical in all material respects to the preliminary injunction that has been in force since May. Yet, at no point during the preceding four months did the government argue to District Judge Forrest that the President was "irreparably harmed" by the injunction even though it has been in force continuously since May 16, 2012. There is no basis for a stay since the government made no claim of irreparable harm over the preceding four months.

The government cannot show a likelihood of irreparable harm absent the stay because, as it concedes, it finds § 1021(b) to be superfluous. The requirement that the movant will likely suffer some irreparable injury absent the issuance of a stay probably is the most difficult factor for the movant to satisfy, and as noted *supra*, the most devastating if not met. John Y. Gotanda, *The Emerging Standards For Issuing Appellate*

*Stays,* 45 Baylor L. Rev. 809, 814 (1993). It also is the most misunderstood requirement. *Id.* This is because "the concept of irreparable injury does not readily lend itself to definition". *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Courts find that irreparable harm is the type of harm which cannot be fully rectified by a final decision on the merits in favor of the movant. *See Doe v. Gonzales,* 386 F. Supp. 2d 66, 72 (D. Conn. 2005) (gag order was irreparable harm where movant's timely opinion in newspaper article would be valuable contribution to public discourse on Patriot Act, given his role); *see Roland Mach. Co. v. Dressler Industries, Inc.,* 749 F.2d 380, 382 (absent stay, movant would be put out of business during pendency of appeal is irreparable harm); *but see Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n,* 259 F.2d 921, 925 (D.C. Cir. 1958) (complaining that if case is remanded to commission, it's possible they may not provide adequate hearing is not irreparable harm); *see also Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1205 (2d Cir. 1970). Here, in the government's case, it has not put forth any argument that if the injunction of § 1021(b) is not stayed, the harm caused, if any, cannot be fully rectified by a judgment in its favor adjudicating the legal rights that the government claims are at risk.

When the court finds harm as being irreparable it almost always involves a constitutional right; the government asserts no such right and in fact it is the plaintiffs who would be irreparably harmed by staying the injunction. *See Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Indeed, as shown above, case law is clear that the government has no power to detain civilians in military custody so no designated constitutional function of the President is subverted by the district court order.

The government contends that unspecified national security and institutional interests are affected by the injunction. It relies on *Holder v Humanitarian Law Project,* 130 S. Ct. 2705 (2010) for the proposition that the Court lacks competence to enjoin a law that touches on national security. In essence, the government argues the Court should simply defer to the other branches of government where national security matters are concerned. But that argument has no limit. Indeed, as in the present case, the Court in *Holder* says the limit is when constitutional issues are at stake. *Holder v. Humanitarian Law Project,* 130 S. Ct. 2705, 2727 (2010) (the Government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals").

Next, the government complains of § 1021(b) being enjoined in any manner, as to any person because it places a burden on the military during an active conflict which would cause harm. However, this cry of foul is belied by the fact that the government does not know when or if it uses §1021(b), and what is more, the President himself has said §1021(b) is "unnecessary and breaks no new ground." *See* President Signing Statement, NDAA; *Hedges, et al. v. Obama, et al,* Trial Hearing Transcript, August 7, 2012. A court should not issue a stay of the injunction where the movant does not intend to use the statute being enjoined, nor has any record of using the statute, simply to "allay" the movant's unspecific anxieties. *See Standard Brands, Inc. v. Zumpe*, 264 F.Supp. 254, 267-68 (E.D.La.1967).

Next, the government argued before the Second Circuit that it has suffered a *form* of irreparable harm because laws passed by Congress are presumed constitutional, and as such, cites to *Turner Broadcast System, Inc v. F.C.C,* 507 U.S. 1301(1993) for the

proposition that §1021(b) should remain in effect pending a final decision by the Supreme Court. However, the proposition held in that decision appears to come into play only when the stay at issue will not affect the party opposing the stay, and only if there are no inequities weighing against the stay. *Marshall v. Barlow's, Inc*., 429 U.S. 1347, 1348 (1977) ("The proposed stay will not affect the respondent in any way, and there are no equities weighing against it which may be asserted by persons actually before the Court. *In such a situation*, where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court". (emphasis added)). That presumption is plainly not true in this case, and therefore *Turner Broadcast System, Inc. v. FCC*, 507 U.S. 1301 (1993), is inapposite here.[29]

C. Plaintiffs Will Continue to Suffer Substantial and Irreparable Harm If Stay Remains; Findings of Fact Presumed True Unless Abuse of Discretion.

Fed. R. Civ. P. 8 requires the movant of a motion for stay to make an application to the district court who ordered the injunction. If the district court has denied the stay, and no new issues have been presented since that denial, the Court of Appeals should give the District Judge's action appropriate deference. *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986). Indeed, Courts of Appeals, when deciding motions to stay district court's injunctions, are "not reviewing the district judge's grant of the injunction, and [are] therefore not bound to defer to his [or her] judgment." But ,"… are, however, bound

[29] Accord *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) where Black, J. refused to stay the civil rights statute where it had been *up*held as constitutional by the trial court. As §1021(b) has already been declared to be unconstitutional, the reasoning of both *Turner* and *Heart of Atlanta* is inapposite here.

to accept the district court's factual findings unless [they] find them to be 'clearly erroneous." *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991); Fed.R.Civ.P. 52(a).

Judge Forrest explicitly states that the factual record establishes substantial and irreparable harm to Plaintiffs first amendment rights. *See* Order at 109. Further, the Supreme Court has held that injury upon First Amendment rights is *per se* irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373(1976); *Salinger v. Colting*, 607 F.3d 68, 81-82 (2010); *Bronx Household of Faith v. Bd. of Educ. of New York,* 331 F.3d 342, 349 (2d Cir. 2003) (where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed). Therefore, the government has a mighty burden indeed to overcome that presumption.

D. Public Interest Is Unaffected By Injunction Pending Disposition Where the Government Has Admitted Sec. 1021 Is Unnecessary For National Security.

The government has the burden of persuading the Court that the public interest lies in having an injunction of §1021(b) stayed pending a judgment on the merits. It has put forth a woefully inadequate showing of that proof. It does not cite to any authority that the public interest has traditionally lied in the government's favor when constitutional issues are at stake. Rather, it cites to *Virginian Ry. Co. v. Sys. Fed'n No. 40* for the proposition that when the military relies on a statute enacted by Congress for wartime activities, the courts should give deference to the other branches because the policy of Congress is to be presumed in the public interest. *Virginian Ry. Co*, 300 U.S. 515, 552 (1937) ("military's reliance on a statutory authorization of detention as an aspect of the use of military force harms these democratic interests, because the policy of

Congress is in itself a declaration of the public interest.) However true that may be, the proposition is not applicable here because the government has not established in the trial record that the military has relied on §1021(b). Similarly, the government's claims that Judge Forrest's injunction causes irreparable harm to the public interest because it creates "dangerous confusion into the area of military operations abroad during an active armed conflict" should be dismissed outright. If the government does not know whether the statute has been used in the nine months since its enactment, as it said at the trial hearing, and the government is aware of the fact that a final judgment by the district court held the statute unconstitutional, then the only dangerously confused party is the government.

### E. Staying The Injunction Is Against The Public's Interest In Free Speech And Association.

When contemplating a motion for stay of injunction, Courts of Appeals in numerous circuits considering the fourth factor 'where the public interest lies', have held "it is always in the public interest to protect constitutional rights." *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (quotation omitted) (reversing the District Court, Court of Appeals held that public interest factor weighed against state statute prohibiting the picketing of military funerals); *Kirkeby v. Furness,* 52 F.3d 775(1995) (reversing District Court, Court of Appeals held that public interest factor weighed against city ordinance prohibiting protesting abortion clinics), citing *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)).

The stay goes well beyond the claim of alleged irreparable harm cited by the government on its emergency motion. Though the government directed its stay motion to that aspect of Judge Forrest's order enjoining the detention of civilians outside of the U.S.

in connection with hostilities under the AUMF, the Second Circuit stayed the *entire* injunction pending appeal including that part of the injunction that barred detention of civilians in military custody within the domestic territory of the United States, contrary to 140 years of repeated decisional precedent of this Court. See *supra,* Point I B. As the government has never had the statutory power to do so – i.e., to detain civilians in military custody – the Second Circuit's stay of the injunction within the United States alters the existing (and two centuries long) status quo.

Fundamental to the government's stay application before the Second Circuit was the argument that the power to detain civilians in military custody under the "substantially supported" standard in §1021 has long been a part of the government's power under the "law of war" under the AUMF. Relying primarily on cases in the D.C. Circuit, the government argued to the Second Circuit that the injunction must be stayed since it interferes with the president's long-standing detention power under the law of war. The government further argued that the D.C. Circuit has repeatedly recognized such detention power.

Subsequent to the Second Circuit's order granting the stay, the D.C. Circuit repudiated this entire line of reasoning. On October 16, 2012, the D.C. Circuit held that an al-Qaeda driver detained in Afghanistan could not be prosecuted by military commission under the "law of war" for having given "material support" to terrorists. See *Hamdan v. United States*, 2012 U.S. App. LEXIS 21385 (D.C. Cir. October 16, 2012). In *Hamdan*, the Court of Appeals reversed Hamdan's conviction for "material support" of terrorism on the ground that "material support" has never been a part of the "law of war". *Hamdan* is unequivocal in so holding:

> [T]he issue here is whether *material support for terrorism* is an international-law war crime. The answer is no. International law leaves it to individual nations to proscribe material support for terrorism under their domestic laws if they so choose. There is no international-law proscription of material support for terrorism.

2012 U.S. App. LEXIS 21385 at 31-32. On this basis, the D.C. Circuit reversed Hamdan's conviction since the military commission had no authority to try him for the offense of "material support" as it is not an offense under the "law or war".

*Hamdan* is fatal to the government's defense as to the constitutionality of §1021(b) and eliminates any basis for the temporary stay. Logically, if the more serious offense of "material support" is not within AUMF detention authority under the "law of war", then the lesser offense of "substantially supporting" terrorists, as now codified under §1021(b), was also outside of the AUMF or the "law of war". As the government's brief in the Second Circuit relied almost entirely upon the contention that the D.C. Circuit had recognized such detention authority under the AUMF and "law of war", the government's primary argument in support of the stay is meritless in light of the D.C. Circuit's rejection of this reasoning in *Hamden*. Moreover, as the Supreme Court recognized in both *Hamdi*, infra, the president has never had the power to detain civilians in military custody and cannot be "irreparably harmed" by Judge Forrest's order depriving him of a power he never possessed.[30]

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[30] NDAA's potential for harm to individuals, however, is real and while §1021(e) 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*. See Executive Order, November 13,2001, 66 FR 57833.

In this context, 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

## CONCLUSION

This Court should vacate the Second Circuit's stay.

Respectfully submitted,

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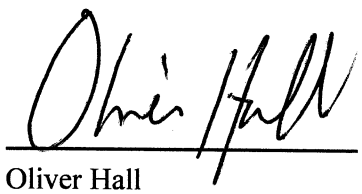

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cases in which years ensue before the detainee sees judicial relief. Order at 76, 104-105 and n. 43. The district judge noted specifically that in *Almerfedi v. Obama*, 654 F. 3d 1, 5 (D.C. Cir. 2011), it took seven years for the detainee's case to reach the courts. Order 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.

**CERTIFICATE OF SERVICE**

I, Oliver B. Hall, a member of the bar of this Court, hereby certify that on this 12th day of December, 2012, a copy of the foregoing Plaintiffs-Petitioners' Emergent Application to Vacate Temporary Stay of Permanent Injunction, was delivered by hand to the party below, and that all parties required to be served have been served:

August E. Flentje
Civil Division, Room 3613
Department of Justice
950 Pennsylvania Ave., NW
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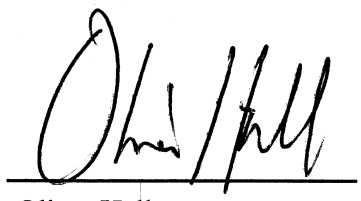

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