12-3176, 12-3644

In The United States Court of Appeals
for the Second Circuit

CHRISTOPHER HEDGES, *et al.*, Plaintiffs-Appellees,
v.
BARACK OBAMA, *et al.*, Defendants-Appellants.

On Appeal from the U.S. District Court
for the Southern District of New York, Case No. 12-cv-331

Brief *Amicus Curiae* of U.S. Congressman Steve Stockman, Virginia Delegate Bob Marshall, Virginia Senator Dick Black, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., U.S. Justice Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, The Lincoln Institute for Research and Education, The Western Center for Journalism, Tenth Amendment Center, Center for Media and Democracy, Restoring Liberty Action Committee, U.S. Border Control, Policy Analysis Center, Constitution Party National Committee, Pastor Chuck Baldwin, and Professor Jerome Aumente in Support of Appellees and Affirmance

OF COUNSEL:
Gary G. Kreep
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 3
Ramona, CA 92065-2355

Steven J. Harfenist
FRIEDMAN HARFENIST KRAUT & PERLSTEIN LLP
3000 Marcus Ave., Ste. 2E1
Lake Success, NY 11042
December 17, 2012

*William J. Olson
Herbert W. Titus
John S. Miles
Jeremiah L. Morgan
Robert J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, Virginia 22180-5615
(703) 356-5070
wjo@mindspring.com
* Counsel of Record
Attorneys for *Amici Curiae*

DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Downsize DC Foundation, DownsizeDC.org, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, The Lincoln Institute for Research and Education, The Western Center for Journalism, Center for Media and Democracy, Restoring Liberty Action Committee, U.S. Border Control, and Policy Analysis Center, through their undersigned counsel, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. The Constitution Party National Committee is an incorporated political committee, registered with the Federal Election Commission. All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

The Tenth Amendment Center is a for-profit corporation which has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock. The Institute on the Constitution is an unincorporated entity. The other *amici* herein are individuals.

/s/ William J. Olson
William J. Olson

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INTEREST OF *AMICI CURIAE*

Individual *amici curiae*.[1] U.S. Congressman Steve Stockman served in Congress (1995-97) and was elected to represent the 36th District of Texas in the 113th Congress. Delegate Bob Marshall, a senior member of the Virginia House of Delegates, was Chief Patron of H.B. 1160,[2] the first state law prohibiting state officials from participating in NDAA detentions. Senator Dick Black is a member of the Virginia State Senate who helped lead the fight for passage of H.B. 1160. Chuck Baldwin is Pastor of Liberty Fellowship, Kalispell, Montana, and was the 2008 Constitution Party candidate for President of the United States. Professor Jerome Aumente is Distinguished Professor Emeritus and Special Counselor to the Dean, School of Communication and Information, Rutgers, The State University of New Jersey.

Organizational *amici curiae*. Downsize DC Foundation, DownsizeDC.org, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, The Lincoln Institute for Research and Education, The Western Center for Journalism, Center

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[1] No party's counsel authored this brief in whole or in part. No person, including a party or a party's counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this Brief *Amicus Curiae*.

[2] http://lis.virginia.gov/cgi-bin/legp604.exe?121+sum+HB1160

for Media and Democracy, Restoring Liberty Action Committee, U.S. Border Control, and Policy Analysis Center are an ideologically diverse group of nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Institute on the Constitution is an educational organization. The Tenth Amendment Center is a for-profit corporation. The Constitution Party National Committee is an incorporated national political party. Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.

Most of these *amici* jointly submitted the only *amicus curiae* brief filed below (Apr. 16, 2012) in support of the preliminary injunction, urging the district court to grant plaintiffs' motion for a preliminary injunction.[3]

Several of these *amici* jointly submitted an *amicus curiae* brief (Sept. 24, 2012) supporting the Second Circuit's standing decision in Amnesty Int'l v. Clapper, U.S. Supreme Court No. 11-1025.[4]

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[3] http://www.lawandfreedom.com/site/constitutional/Hedges_Amicus.pdf.

[4] http://www.lawandfreedom.com/site/constitutional/ClappervAmnestyIntl_Amicus.pdf.

ARGUMENT

I. THE NDAA DETENTION SECTIONS WERE WRITTEN TO BE SUBJECT TO VARIOUS INTERPRETATIONS.

A. The Parties Offer Diametrically Opposite Readings of the Same Language.

Rarely has a short statute been subject to more radically different interpretations than Section 1021 of the National Defense Authorization Act of 2012 (" NDAA"). The Government contends that NDAA does no more than "explicitly reaffirm[] ... the President's detention authority under" the Authorization for Use of Military Force ("AUMF") — the Congressional Joint Resolution passed on September 14, 2001. Appellants' Brief ("Govt. Br."), p. 2. In its Emergency Motion for a Stay Pending Appeal, the Government represented that "the only plaintiffs NDAA section 1021(b)(2) might impact are noncitizens who are outside of the United States." Emergency Motion (Sept. 17, 2012), p. 26. On the other hand, Appellees analyze NDAA as an unprecedented delegation to the military of arbitrary power over U.S. citizens:

> The Framers would be greatly shocked to hear the United States assert that an American President has power to place civilians in the U.S. or citizens abroad into military custody absent status as armed combatants. No President has ever held such power. [Appellees' Brief ("Hedges Br."), p. 53.]

If the Government's theory were true, then the U.S. Senate spent weeks debating and enacting, and the U.S. Department of Justice has worked mightily to uphold, a meaningless and unnecessary statute. However, if the Appellees are correct, then the district court's conclusion — that Section 1021(b)(2), and its companion subsections (d) and (e), differ materially from AUMF, creating a reasonable and objective fear of detention — should be affirmed. *See* Hedges Br., pp. 1-12. At the outset, then, it would appear appropriate to examine closely the pertinent legislative history.

B. The Legislative History of NDAA Reveals the Gap between the Clear Purpose and the Ambiguous Statutory Language.

The NDAA detention provisions, and the one amendment which was adopted creating subsection (e), were not drafted in haste.[5] It is not likely that such confusion was introduced accidentally into NDAA by the professionals working for the U.S. Senate Office of the Legislative Counsel who "strive to turn every request into clear, concise, and legally effective legislative language."[6] Nor is the confusion of the language a product of the legislative equivalent of the fog

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[5] Senator Saxby Chambliss (R-GA) said the matter had been "a point of discussion for almost 3 years." Cong. Rec. S7661 (Nov. 17, 2011).

[6] Website of the Office of the Legislative Counsel, United States Senate (Dec. 11, 2012), http://slc.senate.gov/.

of war. Rather, the legislative history suggests another reason for the stark difference of statutory interpretation.

The original Senate bill, S. 1253, contained a limiting subsection 1031(d), stating with clarity that:

> The **authority to detain** a person under this section **does not extend** to the detention of **citizens** or lawful resident aliens of the United States on the basis of conduct taking place within the United States except to the extent permitted by the Constitution of the United States. [Emphasis added.[7]]

However, this limiting language was deleted in a substitute bill, S. 1867, introduced by Senator Carl Levin (D-MI).

In response to this change, Senator Mark Udall (D-CO) proposed an amendment to replace the entirety of Section 1031 (now Section 1021) with a requirement for a Presidential report to Congress. S.Amdt. 1107. In support, Senator Udall repeated a widely circulated story[8] that the Obama Administration opposed the detention provision because it would apply to U.S. citizens. Senator Levin challenged Senator Udall's representation, revealing for the first time that it was in fact the Obama Administration that had insisted that the limiting language

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[7] http://www.gpo.gov/fdsys/pkg/BILLS-112s1253rs/pdf/BILLS-112s1253rs.pdf.

[8] *See* Section I.C., *infra.*

be removed, as he had done. Cong. Rec. S7657 (Nov. 17, 2011). During debate, Senator Lindsey Graham (R-SC) insisted that the substitute detention provision applied to U.S. citizens captured on U.S. soil, because the "authority to detain ... designates the world as the battlefield, including the homeland," and any detained person should be given neither a lawyer nor a trial. Cong. Rec. S7676 (Nov. 17, 2011).[9] On November 29, 2011, the Udall amendment failed by a vote of 38-60.

On December 1, 2011, Senator Dianne Feinstein (D-CA) made a second effort, proposing two amendments to ensure that U.S. citizens captured on U.S.

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[9] Senator Graham characterized the entire globe as the theater of combat. Later, Senator Graham argued that, since the President can target U.S. citizens overseas for extrajudicial assassination, he should be able to detain U.S. citizens in the homeland indefinitely. Cong. Rec. S8662 (Dec. 15, 2012).

Considerable deference was given to the views of Senator Graham. Senator McCain described Senator Graham as the Senator: "who knows more about detainees than any Member of this body without question. He continuously travels to Iraq and Afghanistan, he has visited the prisons. He understands the issues better than anyone." Cong. Rec. S6628 (Oct. 18, 2011). Indeed, Senator Graham worked on detainee matters as an Air Force JAG officer. *See* "About Senator Graham: Biography," http://lgraham.senate.gov/public/index.cfm?FuseAction=aboutsenatorgraham.biography.

To this date, Senator Graham serves in the Air Force reserves, despite the prohibition in Article I, Section 6 against any "person holding any office under the United States be[ing] a member of either House during his continuance in office." A recent study of the history of this provision has documented that any member of Congress who accepted a military appointment vacated his seat. D. Shaw, "An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserve," 97 *Georgetown L. Rev.* 1739, 1746 (2009). Largely ignored and unenforced today, the clause was originally intended to "prevent executive corruption of the legislature." *Id.* at 1741-42.

soil would not be covered by the detention provisions. Both failed by a vote of 45-55. S.Amdt. 1125 and 1126.

In the meantime, the American Civil Liberties Union ("ACLU") sounded the alarm,[10] mobilizing many organizations and blogs of all ideological stripes to enter the battle against military detention of American citizens. In an apparent effort to deflect public criticism of the detention provisions, S.Amdt. 1456 was adopted on the last day of Senate consideration on December 1, 2012, by a vote of 99-1, to add subsection (e). It reads:

> 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 person who are captured or arrested in the United States. [Emphasis added.]

Based on their floor statements, if Senators Graham or Levin believed that this section would impose any limitation on the President's authority to detain U.S. citizens, then neither would have voted for it. Yet both did, indicating that the amendment was in no way inconsistent with their view that "existing law" permits

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[10] C. Anders, "Senators Demand the Military Lock Up of American Citizens," ACLU website (Nov. 23, 2011), http://www.aclu.org/blog/national-security/senators-demand-military-lock-american-citizens-battlefield-they-define-being.

the military detention of American citizens arrested on American soil. *See* Cong. Rec. S8122 (Dec. 1, 2012).

C. Post-Enactment Debate Reveals the Political Benefits of Textual Ambiguity.

As word of the detention provisions reached the grassroots, complaints flooded Congress, and the period of *post hoc* rationalization began on both sides of the aisle. Other than Senators Graham, Levin, Chambliss, John McCain (R-AZ), and Kelly Ayotte (R-NH), few appeared to want to be seen as supporting the military detention of U.S. citizens.

The President's insistence on the detention provisions was hidden from public view. Even after the Senate vote on the Udall amendment, the prestigious National Journal erroneously reported that including the preventive detention power over U.S. citizens in the bill would set up a "fight with the White House." Y. Dreazen, Senate OKs Controversial Detainee Provision, Nov. 30, 2011.[11] Even The New York Times missed the November 29, 2011, Levin admission when it editorialized against NDAA detention on December 15, 2011: "[F]or weeks, the White House vowed that Mr. Obama would veto the military budget if the provisions were left in. On Wednesday [December 14], the White House reversed

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[11] http://www.nationaljournal.com/nationalsecurity/senate-oks-controversial-detainee-provision-setting-up-fight-with-white-house-20111129.

field, declaring that the bill had been improved enough ... now that it had passed the Senate. This is a complete political cave-in...."[12] Clearly the Obama Administration wanted to avoid the political heat from its base, resulting from its insistence on NDAA detention powers.

Republicans also came under attack, and needed to defend their votes as well. Senator Bob Corker (R-TN) wrote a constituent, "nothing in this bill changes current law or practice in any way as it relates to U.S. citizens...."[13] House Armed Services Committee Chairman Buck McKeon (R-CA) stated that NDAA "does not address or extend new authority to detain U.S. Citizens" in an article "Myths on the New Detainee Policy" (Dec. 14, 2011).[14] Congressman and former Acting U.S. Attorney Tim Griffin (R-AR) wrote: "Don't believe the rumors about the 2012 NDAA," and "Section 1021 in no way infringes upon a U.S. Citizen's right to due process."[15] Congressman and retired Army Colonel

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[12] Editorial, New York Times (Dec. 15, 2011), http://www.nytimes.com/2011/12/16/opinion/politics-over-principle.html?_r=0.

[13] http://www.youtube.com/watch?v=eNLKzk-wYqs.

[14] http://www.redstate.com/buckmckeon/2011/12/14/myths-on-the-new-detainee-policy/.

[15] The Daily Caller, Dec. 22, 2011, http://dailycaller.com/2011/12/22/dont-believe-the-rumors-about-the-2012-national-defense-authorization-act/.

Chris Gibson (R-NY) referring to subsection (e) said, "'It's right there in the bill, this doesn't change anything.'"[16]

Contrary to these bipartisan protestations, President Obama's Signing Statement tells another story: "I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens.... My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law." Even in this nonbinding statement, President Obama did not clarify whether the trial of a U.S. citizen would be in a military or civilian court. Nor did he detail what legal protections he would provide to detainees.[17]

If the NDAA detention provisions had clearly — rather than through the use of obfuscation — stated what Senators Levin, Graham, and others said in debate, none these members of Congress, nor the President, would have the plausible deniability and political cover that was provided by the carefully crafted

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[16] J. Knefel, "Creeping authoritarianism on Capitol Hill," Salon (Jan. 20, 2012) http://www.salon.com/2012/01/20/creeping_authoritarianism_on_capitol_hill/.

[17] http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540.

ambiguous language of what the Government now contends to be a meaningless subsection (e).

II. THE GOVERNMENT'S ARGUMENT, THAT PLAINTIFFS HAVE NO STANDING TO CHALLENGE NDAA SECTION 1021(b)(2) ON ITS FACE BECAUSE THE SECTION IS NOT A REGULATION OF "PRIMARY CONDUCT," SHOULD BE REJECTED.

A. NDAA Section 1021(b)(2) Is Susceptible to a Facial Challenge.

The Government contends that, because NDAA Section 1021(b)(2) "does not regulate primary conduct," plaintiffs have no standing to challenge that section on its face, either under the First Amendment (for overbreadth) or the Fifth Amendment (for vagueness). Govt. Br., pp. 17, 36-37. As plaintiffs have ably demonstrated, the Government's contention should be rejected because (i) Section 1021(b)(2) does, in fact, regulate "primary conduct," and (ii) the precedents upon which the Government relies are inapposite. *See* Hedges Br., pp. 22-25. Moreover, there are additional reasons why the Government's argument should be rejected.

According to the Government's theory of standing, only if Section 1021(b)(2) contained an outright prohibition against a person providing "substantial support" to an "associated force" of the named entities could a plaintiff have standing to challenge Section 1021(b)(2) on its face. Govt. Br., pp.

36-37. Because Section 1021(b)(2) only vests "authority" in the President, subject to his "judgment and discretion," not as directed by Congress, the Government argued that Section 1021(b)(2) is not a prohibition against "substantially support[ing]" any forces "associated" with al-Qaeda or the Taliban. Govt. Br., pp. 36-37. Therefore, the Government asserts that plaintiffs have no standing to facially challenge Section 1021(c)(2), but must await either a credible threat, or an actual effort, by the President to preventively detain them. Even then, according to the Government, plaintiffs could only challenge the constitutionality of Section 1021(b)(2) as applied. *See* Govt. Br., pp. 17, 36-37.

In light of the well-developed First Amendment doctrine of overbreadth and the Fifth Amendment doctrine of vagueness, the Government's position is nonsensical and should be rejected. In the seminal overbreadth case of Gooding v. Wilson, 405 U.S. 518 (1972), the Supreme Court decided that a Georgia statute prohibiting the use of "opprobrious words or abusive language" tending to cause a breach of the peace on its face violated the First Amendment because the language of the statute was not sufficiently "narrow and precisely drawn" to preclude arrests and prosecutions for constitutionally protected speech. *Id.*, 405 U.S. at 519-520. According to the theory of the Government here, the plaintiff in Gooding would not have had standing if, instead of an outright prohibition, the statute would have

vested "discretion and judgment" in a police officer to arrest, or a district attorney to prosecute, a person for using "opprobrious words or abusive language." Whether a statute regulating speech imposes an outright prohibition, or whether it vests discretion in the executive to arrest or to charge a violator, the First Amendment issue is the same: whether the statutory language is sufficiently precise to protect constitutionally protected speech. *See*, *e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

Likewise, in applying the Fifth Amendment doctrine against vague statutes, it would not matter whether the statute is a regulation of primary conduct, or an authorization to take action against such conduct. The rule is the same: the language of the statute must be sufficiently precise so that, as a practical matter, the statute does not impermissibly delegate to a government official "basic policy matters ... for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. Rockford, 408 U.S. 104, 109 (1972) (italics original).

B. Allowing Only "As Applied" Challenges, such as through Habeas Corpus, Would Be a Totally Inadequate Remedy.

The Government suggests that "exercises of Congress's Article I powers ... **may be** subject to as-applied challenges in habeas corpus or other tailored

remedial proceedings," as habeas is the remedy "the Constitution itself furnishes [as] an avenue for resolving challenges to Executive detention." Govt. Br., pp. 45, 48 (emphasis added). Yet what the Government gives, it then takes away. After suggesting that the Constitution provides habeas corpus as the remedy, it immediately denies the availability of habeas. Citing Munaf v. Geren, 553 U.S. 674 (2008), the Government contends that "habeas relief should not be granted in cases involving 'detainees ... captured by our Armed Forces' in 'an active theater of combat,' because it would amount to an unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad.'" *Id*., pp. 55-56. The meaning of "active theater of combat" could very well include American soil, the war against terrorism being worldwide, as Senator Graham has asserted. *See* Section I.B, *supra*.

The Appellees respond to the Government's habeas argument by pointing out that "[h]abeas relief is not a sufficient protection," since NDAA's assertion that detainees "will have rights under 'existing ... authorities'" is completely unclear, and detentions can continue for years while habeas cases proceed through courts. Hedges Br., p. 52.

If the only type of challenge that may permissibly be brought is an "as applied" one, all Americans remain subject to being detained at the discretion of

military officials. Although the Government's brief repeatedly speaks in terms of the President's authority as Commander-in-Chief (*see*, *e.g.*, Govt. Br., pp. 19, 21, 41-44, 55), there is no requirement that the President authorize each arrest, as the detention power "includes the authority of the Armed Forces of the United States to detain covered persons...." NDAA Section 1021(a). Therefore, there is no statutory constraint on an arrest being authorized by a military officer of unspecified rank. There would be no protection provided by the requirement of a Grand Jury indictment. There would be no requirement of an arrest warrant issued by an Article III judge, supported by a sworn affidavit showing probable cause of the commission of a specific crime. Neither would there be any protection against use of compelled testimony, or any violation of due process of law. There would be no civilian proceedings whatsoever against the person detained, in an apparent effort to avoid the protections of the Fifth Amendment. Indeed, there is no requirement that the individual being detained has committed any federal crime.

Additionally, military arrests might be expected to occur with a greater degree of stealth than those involving local police. Military officers would not likely leave a business card and a number to call for further information. After the string of black Suburbans pulls away, it is difficult to believe that the military would provide relatives or lawyers with any information whatsoever as to where

the person being detained was being held. A suspect thought to be associated with terrorism arrested by the military likely would be held at an undisclosed location, incommunicado, to prevent a perceived threat from others associated with terrorism. There likely would be no phone call from a military facility to a lawyer who could initiate habeas proceedings.

Lastly, even if a series of "as applied" challenges could be brought, it is unclear what the "as applied" issues before the various courts would be. It is true that some cases may center around the statutory issue as to whether the individual detained is a "covered person." However, if an individual were deemed to be a covered person, the next issue would invariably concern the constitutionality of the military's authority to detain civilians — particularly U.S. citizens — the very issue involved in this case.

C. Actual Cases Have Already Demonstrated the Inadequacy of the Habeas Corpus Writ.

The arrest might occur as it did with Brandon Raub, a former Marine, who was arrested at his home in Chesterfield County, Virginia, on August 16, 2012 by FBI agents and Chesterfield County police. Raub was placed in a psychiatric ward for posting personal political views on Facebook. Had it not been for some

citizens videotaping the event and posting it on YouTube,[18] a legal defense may never have been mounted. Indeed, it is apparently current government policy at all levels to prevent citizen videotaping of such actions.[19] Had the Government succeeded in Raub's case, he would have been denied access to any judicial hearing, including one before the Virginia Circuit Court Judge who characterized the government's case as "so devoid of any factual allegations that it could not be reasonably expected to give rise to a case or controversy," and then ordered Raub released.[20]

In several instances, the military has held United States citizens isolated from contact with the outside world, shuttling them around from place to place to keep their whereabouts a secret and to avoid review by Article III courts. For example, Jose Padilla, a United States citizen, was detained in Chicago, Illinois, and transferred to a military brig in Charleston, South Carolina. The government

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[18] http://www.youtube.com/watch?v=6KW6_gcQCpg.

[19] *See*, *e.g.*, A. Cohen, "A New First Amendment Right: Videotaping the Police," Time Magazine, May 21, 2012, http://ideas.time.com/2012/05/21/a-new-first-amendment-right-videotaping-the-police/.

[20] *See* "Circuit Court Orders Brandon Raub Released," The Rutherford Institute (Aug. 23, 2012), https://www.rutherford.org/publications_resources/on_the_front_lines/victory_circuit_court_orders_brandon_raub_released_dismisses_case_against_m.

for years argued that military custody of Padilla was critical to national security. *See* Padilla v. Hanft, 432 F.3d 582, 583 (4th Cir. 2005). As soon as the Government sensed that the Fourth Circuit might rule in favor of Padilla, it claimed that it was critical that Padilla be transferred to civilian authorities in Florida in order to stand trial. *Id*. at 584.

III. THE UNCONSTITUTIONALITY OF NDAA SECTION 1021(b)(2) UNDER THE FIRST AND FIFTH AMENDMENTS IS NOT FORECLOSED BY THE LAW OF WAR.

In a remarkably audacious section of its brief, the Government seeks to deny plaintiffs' standing, contending that NDAA Section 1021(b)(2) is not subject to either a First Amendment or Fifth Amendment facial challenge on the ground that neither of the two constitutional provisions applies to "United States military operations in an active armed conflict" being governed primarily by "the law of war." Govt. Br., p. 46. According to the Government's theory, because Article 1, Section 8, Clause 11 "imposes no constraints on how that declaration should be worded," the discretionary powers conferred upon the President by Congress in the 2001 AUMF, as affirmed by NDAA Section 1021(b)(2), are not governed *ex ante* by the First and Fifth Amendments. *Id.*, pp. 46, 48.

The Government's war powers preclusion argument is reminiscent of the Fourth Circuit's view that, since the detention power is derived from the "the war

powers of Articles I and II" and "Article III contains nothing analogous to the specific powers of war," separation of powers principles prohibit a federal court from "'delv[ing] further into Hamdi's status and capture'" — an argument rejected by the Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507, 515 (2004).

The Government misunderstands the Constitution, which was written for a time of war, as well as for a time of peace. There is only one provision in the Constitution which can be suspended in wartime conditions: the writ of habeas corpus, and that suspension requires an act of Congress. U.S. Constitution, Article I, Section 9. And there is only one wartime exception, that being the right to a Grand Jury indictment as set forth in the Fifth Amendment. The war power does not trump the rights and protections of the people in any other instance.

The Government's sole support, in its attempt to sweep aside the Constitution's Bill of Rights, is the Congressional declaration of war "against the Imperial Department of Japan" in World War II (Govt. Br., p. 47), which the Government claims to have been:

> stated in **broadest** terms, with **no** precise descriptions of who exactly my be the subject of force (including **detention**) or under what circumstances, and without any express carve-outs for arguably protected speech. This pattern holds for **every** authorization for the use of military force in our Nation's history — including the AUMF. [*Id.* (emphasis added).]

The Government's position is demonstrably false. The 2001 AUMF departs dramatically from the 1941 Japanese declaration. Rather than offering support for the Government's claim, the differences between the 2001 and 1941 declarations undermine it.

A. The 2001 AUMF Is Not a Constitutional Declaration of War.

As quoted by the Government in its brief, the 1941 declaration stated:

> [T]he President is hereby authorized **and directed to employ** the entire naval and military forces of the United States and the resources of the Government **to carry on war** against the Imperial Government of **Japan**; and, to bring the conflict to a successful **termination**.... [Govt. Br., p. 47 (emphasis added).]

In contrast, the AUMF provides:

> [t]hat the President is authorized **to use all necessary and appropriate force against those nations, organizations or persons he determines** planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, **in order to prevent any future acts of international terrorism** against the United States by such nations, organizations or persons. [Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) § 2(a) (emphasis added).]

The first and most obvious difference between the two resolutions is that, in the case of Japan, war was expressly declared. The Government's quotation from

the Declaration of War omitted the language declaring war.[21] While it may be true, as the Government argues, that the Constitution "imposes no constraints on how that declaration should be worded" (Govt. Br., p. 46), Congress has never been at a loss for words to declare a war when it wanted to, from 1812 to 1942.[22] Invariably, these declarations of war use the word "war," and all but one use the word "declare." The AUMF never used the word "war," and it does not even purport to be a constitutional declaration of war. Indeed, after the events of 9/11, Congressman Ron Paul (R-TX) urged that Congress address whether it should declare war, but he found little interest in Constitutional processes.[23]

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[21] "Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the **state of war** between the United States and the Imperial Government of Japan which has thus been thrust upon the United States **is hereby formally declared**." 77th Cong., 1st Sess., Ch. 561 (Dec. 8, 1941) (italics original) (emphasis added), http://lawandfreedom.com/site/historical/Japan1941.pdf.

[22] *See* Declarations of War in the War of 1812 (Great Britain), the Mexican-American War (Mexico), the Spanish-American War (Spain), World War I (Germany and Austria-Hungary), and World War II (Japan, Germany, Italy, Bulgaria, and Rumania), http://lawandfreedom.com/site/historical/index.html.

[23] http://paul.house.gov/index.php?option=com_content&task=view&id=657&Itemid=28.

Second, although both resolutions "authorize" the President, only the 1941 declaration both "authorizes **and directs"** him to take action. Rather than command the President "to **employ** the entire naval and military forces of the United States," as the Japanese declaration does, AUMF does not command the President to employ any degree of force; rather, AUMF leaves it to the President's discretion to "**determine**" the force that is "necessary and appropriate" to be employed. (Emphasis added.) In 1941, Congress instructed the President to use all the nation's military force and government resources "to carry on war" against Japan; in 2001, Congress left the President the complete discretion as to the level and kind of force to be used.

Third, in 1941, Congress identified a specific enemy: "the Imperial Government of Japan." The AUMF empowered the President to identify the enemy, leaving it to his discretion to "determine" the "nations, organizations or persons [that] planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons...."

Fourth, and finally, the 1941 declaration specified a future time upon which the President's authority would end, namely, when he brought "the conflict [war] to a successful termination." It is in the nature of war between nations that they come to an end. A government which would seek to aggrandize power to itself

through the means of perpetual war would want to avoid declaring a specific war which eventually would end.[24] Further, AUMF sets no definite time when the powers delegated to the President shall cease. To the contrary, the President is authorized, without any definite end, to use whatever military force he sees fit "to prevent any future acts of terrorism" against the United States threatened by yet unspecified "nations, organizations or persons," as specified by the President.

The power to declare war entails both "a legal and a prudential judgment." *See* J. Tuomala, "Just Cause: The Thread That Runs So True," 13 *Dick. J. Int'l. Law* 1, 41 (Fall 1994). According to Article 1, Section 8, Clause 11, both decisions are legislative ones, vested in the Congress of the United States, with the President having no role. *See* Tuomala, "Just Cause," pp. 41-59. In the 1941 declaration, Congress made both judgments, directing the President to wage a war against Japan to its successful termination. AUMF delegated to the President open-ended powers to make the twin judgments: (i) whether the United States had

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[24] In his 2006 State of the Union message, when the war was not yet five years old, President George W. Bush declared "[o]ur own generation is in a long war against a determined enemy." B. Graham, "Abizaid Credited With Popularizing the Term 'Long War,'" Washington Post (Feb. 3, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/02/AR2006020202242.html. Even when a declaration of war specifies the end point to be the "termination" of a particular "conflict" with an identified nation, "the war power does not necessarily end with the cessation of hostilities." *See* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948).

the legal right to use military power to achieve its end, *i.e.*, the prevention of future terrorist acts; and (ii) whether the country could afford to employ its military and other resources to achieve that utopian end.

B. AUMF Unconstitutionally Delegates Legislative Power to the President.

The Government claims that AUMF is the legislative source of the President's authority to detain persons pursuant to NDAA Section 1021(b). Govt. Br., pp. 2, 15. In fact, however, the AUMF delegates to the President the power to determine what is "necessary and appropriate force" to be employed in the war on terror. According to Article I, Section 8, Clause 18, it is for Congress to determine what is "necessary and proper" for carrying out the powers vested in the President, not for the President to determine those rules to govern himself. *See* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952).

However, in its Statement of Facts, the Government claims that the authority granted to the President in Section 1021(b)(2) is "an essentially verbatim affirmation by Congress of the Executive Branch's **interpretation** of the AUMF." Govt. Br., p. 8 (emphasis added). In reality, the Executive Branch's exercise of "interpretation" is a mere euphemism. From the outset of 9/11, the President took the initiative. Congress was more than happy to delegate to the White House the

power to determine what, if any, force was "necessary and appropriate" — not only to identify and punish the perpetrators of the 9/11 terrorist attack, but to determine what would be necessary and appropriate to "prevent" any such attacks in the future. Having conferred upon the President *carte blanche* powers, it is not surprising that the Government asserts that:

> Section 1021(b)(2) ... makes it crystal clear that Congress intended to **affirm** for the Executive Branch the **detention authority** under the AUMF and the interpretation of that authority that the President has long **articulated** and exercised..... [Govt. Br., p. 8 (emphasis added).]

Indeed, in keeping with its submissive stance toward the President in war matters, Congress enacted NDAA Section 1021(d) which, as the Government is careful to point out in its brief, "states that [n]othing in this section is intended to limit or expand the authority of the President or the scope of [AUMF]." *Id.* In other words, the President alone determines the rules governing the military's exercise of detention authority under AUMF and in the NDAA.

In light of these legislative concessions to Presidential power, the Government's occasional references to a congressionally declared or authorized operation against an enemy force (Govt. Br., pp. 3, 4) are very hollow indeed. The Constitution grants Congress the power "to make all Laws which shall be

necessary and proper for carrying into Execution" the war power. Art. I, Sec. 8, Cl. 18. However, the AUMF and NDAA Section 1021(b)(2) — both as written and as explained by the Government's brief — testify to the unmistakable fact that the military's detention powers exercised in the so-called war on terror have been both made and executed in a manner prescribed by the President (not in a manner prescribed by Congress), in pursuit of a policy determined by the President (not by Congress), contrary to applicable separation of powers principles. *See* Youngstown, 343 U.S. at 588-89.[25]

C. The President's Indiscriminate Power to Preventively Detain American Citizens under AUMF, as Reflected in Section 1021(b)(2), Facially Conflicts with the Treason Clause of Article III of the Constitution.

The AUMF and Section 1021(b)(2) extend to the President the power to preventively detain any "person" who the President, at his discretion, determines has "substantially supported" forces "associated" with al-Qaeda or the Taliban. As pointed out by Appellees, "the NDAA, § 1021(b)(2) is drafted in terms that authorize military jurisdiction over civilians, including U.S. citizens detained in the U.S. and abroad." Hedges Br., p. 57. To be sure, the Government denies it has

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[25] Even if Congress exercised its power under the necessary and proper clause, it may not constitutionally extend military jurisdiction over noncombatant U.S. citizens. *See* Hedges Br., pp. 55-58.

this effect, but can point to no language in the AUMF or in the NDAA expressly denying that the President's discretionary authority to preventively detain "enemy combatants" includes American citizens. *See* Govt. Br., pp. 23-25.

Instead, the Government asserts that Section 1021(d)-(e) "does [not] grant any **new** authority as to the detention of U.S. citizens" (*id.*, p. 24), with the further assurance that the President has, by a non-binding Signing Statement, stated that he "**will** not authorize the indefinite military detention without trial of American citizens." *Id.*, p. 25 (emphasis added). It is one thing for the President to state that he "will not"; it is quite another to state that he "legally may not." As demonstrated above, the AUMF, which the Government contends is the sole source of the President's authority to preventively detain, does not constrain his discretion in such a way as to make it impermissible for the President to preventively detain an American citizen.

As Appellees have demonstrated, the Constitution does not confer upon the President or upon Congress any power to subject civilians to "detention by the military," as AUMF and Section 1021(b)(2) do, even if the nation is at war. *See* Hedges Br., pp. 50-58. And, as Appellees have argued, access to habeas corpus is

"not a satisfactory remedy to the burden of military detention" (*id.*, p. 52),[26] for a citizen who is suspected of substantially supporting a force associated with any enemy, al-Qaeda, the Taliban, or otherwise.

Not only is habeas relief unsatisfactory, imposing upon an American citizen the burden of seeking habeas relief to escape from military detention is constitutionally impermissible under the Treason Clause of Article III, Section 3. In *Federalist No. 43*, James Madison asserted that the Treason Clause must be understood as one of the enumerated powers of the federal government, placing severe limits on the legislative power not only to define the elements of treason, but to preclude Congress from evading the constitutional definition of treason by "new-fangled and artificial" definitions. Federalist No. 43, G. Carey & J. McClellan, ed., The Federalist (Kendall/Hunt Pub. 1990), p. 223. At the periphery of the constitutional definition of treason is "adhering to the [] enemies [of the United States] giving them aid and comfort." Section 1021(b)(2)'s provisions fall far short of this constitutional standard, encompassing persons suspected of "substantially supporting" forces "associated" with the al-Qaeda and Taliban enemies. On its face, then, Section 1021(b)(2) is unconstitutional, falling short of the power as it is enumerated in the Article III text. Additionally, Section

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[26] *See* Section II, *supra*.

1021(b)(2) lacks the requisite specificity with respect to the Constitution's evidentiary requirement of "the testimony of two witnesses to the same over act." Art. III, Sec. 3. Indeed, Section 1021(b)(2) authorizes detention without any demonstration of eyewitness testimony, much less two witnesses.

Although such strictures may appear to hamper the nation when it has been attacked, Joseph Story reminds us that the founders had good reason for demanding that treason's "nature and limits should be exactly ascertained":

> [A] charge of this nature, made against an individual, is deemed so opprobrious, that, whether just or unjust, it subjects him to suspicion and hatred; and in the times of high political excitement, acts of a subordinate nature are often, by popular prejudices ... magnified into this ruinous importance. [2 J. Story, Commentaries on the Constitution § 1797, p. 577 (5th ed., Little Brown: 1891).]

IV. AS A MEMBER OF THE THIRD BRANCH OF THE FEDERAL GOVERNMENT, THIS COURT HAS A DUTY TO ADDRESS THE CONSTITUTIONAL ISSUES IN THIS CASE AS REPEATEDLY ASSERTED BY THE SEVERAL STATES.

Following enactment of NDAA, state and local officials across the nation have expressed opposition to the constitutional violations perceived in NDAA Section 1021. State legislators have taken different approaches to stand against this new power, some communicating their opinion to Congress that the law is

unconstitutional, others withholding state assistance from any effort of the federal government to use the NDAA detention power.[27]

Some state legislatures have passed nonbinding resolutions. For example, the Rhode Island House of Representatives resolved that NDAA Section 1021 was unlawful, and called on Congress to repeal NDAA's detention provisions.[28] The Arizona legislature passed a concurrent resolution[29] determining that Section 1021 violates no fewer than 11 rights recognized and protected by the Constitution. The Arizona Resolution concluded with an instruction to communicate its views to the President and Congress: "That the Members of the Legislature condemn Sections 1021 and 1022 of the 2012 NDAA as they purport to repeal posse comitatus and authorize the President of the United States to use the armed forces of the United

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[27] *Amicus* Tenth Amendment Center tracks state and local government responses to NDAA, and has identified such efforts across the country. http://tenthamendmentcenter.com/nullification/ndaa/.

[28] Rhode Island House Resolution H 7916, http://webserver.rilin.state.ri.us/ BillText/BillText12/HouseText12/H7916A.pdf (passed June 12, 2012).

[29] Arizona Senate Concurrent Resolution 1011 (2012), http://www.azleg.gov/ legtext/50leg/2r/laws/scr1011.pdf (passed Senate Mar. 5, 2012; passed House Apr. 18, 2012).

States to police American citizens, to indefinitely detain persons captured within the United States without charge until the end of hostilities...."[30]

Virginia took the matter one step further. On April 28, 2012, the Commonwealth of Virginia enacted a law barring any state agency or political subdivision or employee or the National Guard from "knowingly aid[ing] an agency of the armed forces of the United States in the [unlawful NDAA] detention of any citizen...." Code of Virginia, § 2.2-614.2:1 (2012).[31] Recently, on December 5, 2012, the Michigan House of Representatives unanimously (107-0) passed a bill substantially similar to the Virginia law.[32]

These efforts do not break new ground. They build on lessons learned since the beginning of the Republic.[33] If the federal government breaches the bounds of

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[30] Arizona also overwhelmingly passed a bill that would have prevented Arizona's participation with enforcement of Section 1021. *See* Arizona S.B. 1182. Although vetoed by Governor Janice Brewer (R), the bill passed the Arizona Senate (20-8-2) and the House (34-22-3), http://www.azleg.gov/legtext/50leg/2r/bills/sb1182h.pdf.

[31] The chief patron of that bill was *amicus* Delegate Bob Marshall, and it was supported by *amicus* Senator Dick Black.

[32] *See* Michigan House Bill 5768 (2012), http://www.legislature.mi.gov/%28S%28kzap3dzv4omswk45yecxft2p%29%29/mileg.aspx?page=getObject&objectName=2012-HB-5768.

[33] *See* Virginia Resolution of 1798, penned by James Madison, responding to the Alien and Sedition Acts of 1798.

its authority, the nation's independent and sovereign states can be expected to respond to protect the liberties of their people. Although state and local officials in our federal republic are uniquely positioned to interpose on behalf of the people against overreaching federal legislative and executive action, a federal judiciary was provided for by Article III, Section 2 of the Constitution to adjudicate "all cases ... arising under this Constitution." As Chief Justice John Marshall observed, vesting such power in the courts requires judges to "look[] into" the constitution, "examining" its text to determine whether actions of the other two branches conform to the written instrument. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178-79 (1803). In this case, the executive branch is arguing on behalf of the legislative branch that the judicial branch may not even look into the Constitution to determine if Section 1021(b)(2) violates First and Fifth Amendments. As Chief Justice Marshall responded in Marbury, the Government's claim is "too extravagant to be maintained." *Id*. at 179.

CONCLUSION

For the reasons stated herein, the decision of the district court should be affirmed.

Respectfully submitted,

/s/ William J. Olson

OF COUNSEL:
Gary G. Kreep
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 3
Ramona, CA 92065-2355

Steven J. Harfenist
FRIEDMAN HARFENIST KRAUT & PERLSTEIN LLP
3000 Marcus Ave., Ste. 2E1
Lake Success, NY 11042

December 17, 2012

*William J. Olson
Herbert W. Titus
John S. Miles
Jeremiah L. Morgan
Robert J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, Virginia 22180-5615
(703) 356-5070
wjo@mindspring.com

* Counsel of Record
Attorneys for *Amici Curiae*
Congressman Steve Stockman, *et al.*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of Amicus Curiae of Congressman Steve Stockman, *et al.* in Support of Appellees and Affirmance complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 6,999 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*
Congressman Steve Stockman, *et al.*

Dated: December 17, 2012

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Congressman Steve Stockman, *et al.*, in Support of Appellees and Affirmance, was made, this 17th day of December 2012, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*
Congressman Steve Stockman, *et al.*