No. 13-758

IN THE

Supreme Court of the United States

CHRISTOPHER HEDGES, *ET AL.*, *Petitioners*,

v.

BARACK OBAMA, *ET AL.*, *Respondents*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Brief *Amicus Curiae* of U.S. Congressman Steve Stockman, VA Delegate Bob Marshall, VA Senator Dick Black, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Center for Media & Democracy, Downsize DC Foundation, DownsizeDC.org., Free Speech Defense & Education Fund, Free Speech Coalition, Western Journalism Center, The Lincoln Institute, Institute on the Constitution, Abraham Lincoln Foundation, and Conservative Legal Defense & Education Fund, *et al.* in Support of Petitioners

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Restoring Liberty Action Committee
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Policy Analysis Center
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INTEREST OF *AMICI CURIAE*

Individual *amici curiae*.[1] U.S. Congressman Steve Stockman represents the 36th District of Texas. 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*. U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Center for Media and Democracy, Downsize DC Foundation, DownsizeDC.org, Free Speech Defense and Education Fund, Free Speech Coalition, Western Journalism Center, The Lincoln Institute for Research and Education, Abraham Lincoln Foundation for Public Policy Research, Inc., Conservative Legal Defense and Education Fund,

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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*, and all counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing.

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

Restoring Liberty Action Committee, U.S. Border Control Foundation, 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 a national political party.

Prior *Amicus Curiae* Briefs. Most of these *amici* jointly submitted the only *amicus curiae* brief filed in the district court below urging the district court to grant plaintiffs' motion for a preliminary injunction.[3] Most of these *amici* jointly submitted an *amicus curiae* brief in the U.S. Court of Appeals for the Second Circuit below.[4] Additionally, several of these *amici* jointly submitted an *amicus curiae* brief in Amnesty Int'l v. Clapper, 568 U.S. ___ (2013).[5]

SUMMARY OF ARGUMENT

The ruling of the U.S. Court of Appeals for the

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[3] http://www.lawandfreedom.com/site/constitutional/_Hedges_Amicus.pdf (Apr. 16, 2012).

[4] http://lawandfreedom.com/site/constitutional/Hedges_Amicus_2ndCir.pdf (Dec. 17, 2012).

[5] http://www.lawandfreedom.com/site/constitutional/ClappervAmnesty Intl_Amicus.pdf (Sept. 24, 2012).

Second Circuit[6] did "not address the merits of the plaintiffs' constitutional claims"[7] but rather dismissed the challenge by all the Hedges plaintiffs to Section 1021 of the National Defense Authorization Act of 2012 ("NDAA"), 125 Stat. 1298 (2011), for lack of standing. This amicus curiae brief contends that the court of appeals' opinion is incorrect, specifically as it applies to the standing of American citizens.[8]

The ruling below leaves American citizens vulnerable to arrest and detention, without the protection of the Bill of Rights, under either the plaintiff's or the government's theory of the case. The judiciary must not await subsequent litigation to resolve this issue, as the nature of military detention is that American citizens then would have no adequate legal remedy.

The decision is based on a flawed understanding of NDAA Section 1021, which is significantly different than the Authorization for the Use of Military Force

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[6] The panel's opinion was written not by Senior Circuit Judge Amalya L. Kearse or Circuit Judge Raymond J. Lohier, Jr., but by a district court judge sitting by designation, pursuant to 28 U.S.C. § 292(a). U.S. District Judge Lewis A. Kaplan sits on the bench of the Southern District of New York — the same district court which rendered the decision reversed by the decision under review.

[7] Hedges v. Obama, 734 F.3d 170, 174 (2d Cir. 2013).

[8] Although this case also raises important issues for lawful resident aliens and other persons, this *amicus curiae* brief focuses on issues applicable to American citizens.

("AUMF"), 115 Stat. 224 (2001). Section 1021 is not a nullity as to American citizens. Indeed the court of appeals admitted it clarified existing law. Moreover, Section 1021 authorizes detention potentially forever, and even rendition of American citizens to foreign nations. Subsection (e) does not negate the rest of the statute.

Prior existing law does not permit military detention of American citizens, but the court of appeals opinion prevents any judicial consideration in this case of a challenge to military detentions under AUMF, a statute which was embedded in NDAA Section 1021.

ARGUMENT

I. IF THIS COURT REFUSES TO HEAR THE HEDGES CHALLENGE, IT WILL LEAVE AMERICAN CITIZENS SUBJECT TO UNCONSTITUTIONAL MILITARY ARREST AND DETENTION.

The court of appeals began its opinion with a discussion of the history, legal context, and profound significance of the issue in this case. It explained how AUMF was passed hurriedly by the U.S. Congress to authorize the use of "force" against "nations, organizations, and persons responsible" for the attacks occurring on September 11, 2001. 724 F.3d 173. The court explained that "Presidents Bush and Obama have asserted the right to place certain individuals in military detention, without trial, in furtherance of their authorized use of force." *Id.* The exercise of this supposed "right" has led to "[s]ubstantial litigation" as

to "whom did Congress authorize the President to detain when it passed the AUMF?" *Id.*

The court of appeals understood that Section 1021 of NDAA constitutes:

> Congress' first — and, to date, only — foray into providing further clarity on that question. Of particularly importance for our purposes, Section 101(b)(2) appears to permit the President to detain anyone who was part of, or has substantially supported, al-Qaeda, the Taliban, or associated forces. [*Id.*]

The court of appeals quoted from the *amicus curiae* brief filed by these *amici curiae* in that court, concluding: "[r]arely has a short statute been subject to more radically different interpretations than Section 1021...." 724 F.3d at 173. The opinion of the court of appeals confirms the truth of that observation.

The court of appeals described the litigation as one between the government which "contends that Section 1021 simply reaffirms authority that the government already had under the AUMF" and the plaintiffs who "contend that Section 1021 is a dramatic expansion of the President's military detention authority...." *Id.* However, the court of appeals seemed not to appreciate the reality that, under either the government's or the plaintiffs' theory of the case, American citizens were, and would continue to be, subject to arrest and indefinite detention by the military.

In declining to address the constitutionality of

military detentions of American citizens, the court of appeals did a great disservice to American citizens who now remain subject to military arrest based on the expansive view of Presidential power which the court acknowledged was bipartisan, which now requires this Court to intervene.

If this Court does not grant the petition, there is no reason to believe that U.S. Presidents would cease to assert "the right to place certain individuals [including American citizens] in military detention, without trial." *Id.* There would continue to be 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 against any violation of due process of law. There would be no civilian proceedings whatsoever against the person detained. Indeed, there is no requirement that the individual being detained has committed any federal crime, and military detentions could be used to circumvent the protections afforded American citizens by the Treason Clause of the U.S. Constitution. *See* Ex parte Milligan, 71 U.S. 2, 119-130 (1866).

Additionally, military arrests might be almost impossible to challenge as they could be expected to occur with a greater degree of stealth than those involving local police. 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.[9] A suspect thought to be associated with terrorism and 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 the person being held in a military facility to a lawyer who could initiate habeas proceedings.

This Court must not allow this matter to continue unresolved. It would be no answer to allow such arrests and detentions to occur, subject to subsequent challenge in court, even if the detained person could somehow retain counsel to present his case. And even if such a case were heard, the issue would invariably concern the constitutionality of the military's authority to detain civilians — particularly U.S. citizens — the very issue presented in this case, and avoided by the court of appeals based on its flawed analysis of NDAA and AUMF.

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[9] When dealing with matters of "national security" arrests, vital information can be withheld from anyone — even the President. When German saboteurs during World War II were taken into custody, "the FBI announced it had arrested the eight men. For purposes of national security and self-aggrandizement, Hoover concealed the fact that [one of those arrested] had turned in himself and the others." N. Feldman, Scorpions, p. 217 (Hachette Book Group, 2010).

II. THE COURT OF APPEALS' DENIAL OF STANDING TO THE HEDGES AMERICAN CITIZEN PLAINTIFFS IS BASED ON A FLAWED VIEW OF NDAA SECTION 1021.

The court of appeals' determination is based entirely on its parsing of what it calls the "curious if not contradictory" language of Section 1021 within the context of existing law. 724 F.3d at 189. Reading the statute diametrically differently from the district court,[10] the appellate court concludes that, "with respect to citizens ... Section 1021 simply says nothing at all." 724 F.3d at 192. In other words, it is a nullity. This ruling is clearly wrong, and is at odds with other sections of the court of appeals' opinion.

A. Section 1021 Does more than Affirm Existing Law.

The court of appeals based its view on Section 1021's language "that it only 'affirms' authority included under [the Authorization for Use of Military Force ("AUMF"), 115 Stat. 224 (2001)]," and Section 1021(d) indicates that Section 1021 "is not intended to limit or expand the authority of the President or the scope of the [AUMF]." 724 F.3d at 189. However, such statutory pronouncements do not render the statute a nullity as to American citizens. The only possible substantive basis for the court of appeals' decision is its reading of Section 1021(e), but that reading ignores the inadequacy of the supposed "savings clause" in Section

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[10] *See* Hedges v. Obama, 890 F. Supp.2d 424, 465-71 (S.D.N.Y. 2012).

1021(e).[11]

Before addressing that supposedly key provision of the statute, it is important to observe that the court of appeals' analysis largely ignores numerous other important arguments about the differences between AUMF and NDAA with respect to American citizens presented by the Hedges plaintiffs, and carefully and extensively analyzed and articulated by Judge Forrest in her opinion granting the permanent injunction. 890 F. Supp. 2d 439-72.

- AUMF makes specific reference to the events of September 11, 2001 while Section 1021 is in no way so limited. "Section 1021 appears to be a legislative attempt at an ex post facto 'fix': to provide the President (in 2012) with broader detention authority than was provided in the AUMF in 2001 and to try to ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF." 890 F. Supp. 2d at 429.

- Section 1021 incorporates a "new element" not previously set forth in the AUMF ... 'law of war' language." 890 F. Supp. 2d at 442. Judge Forrest explained that "embodiment of vague 'law of war' principles ... has never heretofore been included in a statute relating to military detention authority after September 11, 2001." *Id*.

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[11] *See* discussion of Section 1021(e) in Section II.C., *infra*.

- Congress on two occasions refused to enact language designed expressly to protect American citizens from the application of Section 1021. Pet. Cert., pp. 19-21.

- Statements by key NDAA proponents such as Senator Lindsey Graham (R-SC) advanced the view that Section 1021 applies to American citizens. *See* Section II.C., *infra.*

- During oral argument, the government was unable or unwilling to assure the plaintiffs that they would not be subject to government detention under Section 1021 based on their protected First Amendment activities. App. 226a-227a.

- The district court's conclusion that "Section 1021 is ... significantly different in scope and language from the AUMF." 890 F. Supp.2d at 444.[12]

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[12] Additionally the court of appeals gave scant attention to the significance of NDAA Section 1022, addressing it only by analogy to Section 1021. 724 F.3d at 192. Section 1022 "requires" that the President "shall hold in military detention [certain] members of al-Qaeda or associated forces" but states that "[t]he requirement to detain a person in military custody under this section does not extend to citizens of the United States." Of course, an exemption from a "requirement" is much different from an exemption from a discretionary power. Thus, in no way does Section 1022's exemption of American citizens from a "requirement" to be held in military detention deny such a presidential power to detain such American citizens. Indeed, one could expect the government to argue in future cases that NDAA Section 1021 impliedly grants to the President such a power, or at least "clarifies" that he has such

Moreover, if all that Section 1021 does is to affirm what AUMF already authorizes as to American citizens, then Section 1021 does nothing to advance the purpose of the NDAA, which is to forward the war on terrorism initially authorized in AUMF. Such a reading would violate the "Presumption Against Ineffectiveness." *See* A. Scalia & B. Garner, Reading Law, pp. 63-65.

Judge Forrest explained that the Government could have eliminated "these plaintiffs' standing simply by representing that their conduct does not fall within the scope of § 1021 [but] [t]he Government chose not to do so — thereby ensuring standing...." Hedges v. Obama, 2012 U.S. Dist. LEXIS 68683, *57 (May 16, 2012). In a desperate effort to undo Judge Forrest's preliminary injunction, the government "changed its position" to attempt to convince the court the plaintiffs were in no danger, but even then, the government's filing was inconsistent and equivocal. 890 F. Supp. 2d at 428-29. The Department of Justice presented no evidence at district court hearings, but relied on the representations of its lawyers. 890 F. Supp. 2d at 432.

In defending the detention of American citizens of Japanese descent, a federal district court found in 1984 that, in arguing Korematsu v. U.S., 323 U.S. 214 (1944): "the government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court's determination." Korematsu v. U.S., 584 F. Supp. 1406, 1420 (N.Dist. Cal. 1984). This finding led

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a power over American citizens.

the district court to issue a cautionary note to all future courts considering similar claims:

> As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. [*Id.* at 1420.]

B. Even Assuming, Arguendo, that the Court of Appeals' Statutory Analysis Is Correct, Petitioners Have Standing.

Petitioners urge this Court to adopt the statutory analysis of Judge Forrest, and these *amici curiae* support their argument. However, these *amici curiae* advance the further proposition that even assuming, *arguendo*, that the statutory interpretation of the court of appeals was correct, the Hedges plaintiffs still have standing to maintain their lawsuit.

Indeed, the court of appeals was of two minds about Section 1021. Earlier in its opinion, the court of appeals had disavowed the view that Section 1021 was mere surplusage. It concedes that "[w]hile Section 1021(b)(1) mimics language in the AMUF, Section 1021(b)(2) adds language absent from the AUMF." 724 F.3d 189. The court of appeals identified a substantive

reason why Congress would include Section 1021. That reason was to resolve an "apparent contradiction" in the law. 724 F.3d at 189-90. There had been confusion as to whether "the AUMF authority to use force against the *persons* responsible for 9/11 includes the power to detain such persons." 724 F.3d at 190. The court of appeals asserted that "reasonable minds might have differed — and in fact very much did differ — over whether the administration could detain those who were part of or substantially supported al-Quaeda, the Taliban, and associated forces." 724 F.3d at 190. Addressing this uncertainty, "**Section 1021(b)(2) eliminates any confusion**" over "whether the administration could **detain** those who were part of or substantially supported al-Qaeda, the Taliban, and associated forces...." 724 F.3d at 190-91 (emphasis added). Importantly, **the court never limited this analysis of Congress' clarifying reason as applying only to persons other than American citizens**. 724 F.3d at 188-191.

The court of appeals explained that its construction of Section 1021 obviated the need to express any view on the scope of the government's detention authority under AUMF.[13] If Section 1021 were an important clarification of that authority, as the court of appeals determined, one would assume that the AUMF detention power informed by that Congressional clarification could be challenged by an American citizen. Yet the court of appeals denied petitioners standing. The court of appeals never mentions, but

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[13] *See* 724 F.3d. at 191, n.130; at 193, n.138.

would appear to rely on, a supposed failure of pleading, in that the Hedges American citizen plaintiffs did not make a direct challenge to AUMF. Such a conclusion would have a perverse effect. AUMF was embedded in Section 1021 and should be subject to challenge for that reason alone. Moreover, as the court of appeals concedes, many people reasonably believed AUMF did not authorize the detention of American citizens, but believe Section 1021 clearly does. According to the court of appeals, those persons would not have standing to challenge what the court of appeals admitted was NDAA's clarification of the government's detention authority under AUMF. Indeed, its ruling on standing could mean that no Congressional clarification of an ambiguous prior law can be challenged.

C. Section 1021(e) Does Not Negate the Remainder of Section 1021.

The court of appeals embraced the government's view below that NDAA does no more than "explicitly reaffirm[] ... the President's detention authority under" AUMF. *See* Appellants' Brief ("Govt. Br."), p. 2. The district court had explained in detail why Section 1021 was "significantly different in scope and language from the AUMF."[14] The court of appeals appeared to base its entire decision on its view that Section 1021(e) negates the applicability of any portion of Section 1021 to American citizens.

If the court of appeals was correct, then the U.S.

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[14] *See* Section II.A., *supra*.

Senate spent weeks debating and enacting, and the U.S. Department of Justice has worked mightily to uphold, a meaningless and unnecessary statute for Americans. However, if the district court was correct, then Section 1021 differs materially from AUMF, creating a reasonable and objective fear of detention. *See* Hedges Br., pp. 1-12.

The NDAA detention provisions, and the one amendment which was adopted creating subsection (e), were not drafted in haste.[15] 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."[16] Nor is the confusion of the language a product of the legislative equivalent of the fog of war. Rather, the legislative history suggests another reason for the stark difference in statutory interpretation.

The original Senate bill, S. 1253 (that was not enacted), contained a limiting subsection 1031(d), stating with somewhat greater clarity that:

> The **authority to detain** a person under this section **does not extend** to the

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[15] Senator Saxby Chambliss (R-GA) said the matter had been "a point of discussion for almost 3 years." 157 Cong. Rec. S7661 (Nov. 17, 2011).

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

> 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.[17]]

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[18] 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 be removed. Cong. Rec. S7657 (Nov. 17, 2011). During debate, Senator Graham 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.

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

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

Cong. Rec. S7676 (Nov. 17, 2011).[19] On November 29, 2011, the Udall amendment to exempt Americans from detention 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. 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,[20] 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

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[19] 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, 2011). Considerable deference was given to the views of Senator Graham. Senator John McCain (R-AZ) described Senator Graham as the Senator: "who knows more about detainees than any Member of this body without question." Cong. Rec. S6628 (Oct. 18, 2011).

[20] 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.

> 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.]

As word of the detention provisions reached the grassroots, complaints flooded Congress, and the period of *post hoc* political rationalization and obfuscation began on both sides of the aisle. Other than Senators Graham, Levin, Chambliss, McCain, 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.[21] 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 field, declaring that the bill had been improved enough ... now that it had passed

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

the Senate. This is a complete political cave-in...."[22] 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...."[23] House Armed Services Committee Chairman Buck McKeon (R-CA) stated that the 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).[24] 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."[25] Congressman and retired Army Colonel Chris Gibson (R-NY), referring to subsection (e), said, "'It's right there in the bill, this doesn't change anything.'"[26]

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

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

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

[25] *The Daily Caller*, Dec. 22, 2011, http://dailycaller.com/ 2011/12/22/ don't-believe-the-rumors- about-the-2012- national-defense-authorization-act/.

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

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.[27]

If the NDAA detention provisions had clearly — rather than through the use of politically motivated obfuscation — stated what Senators 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, ambiguous language of subsection (e).

Indeed, there is no disagreement that none of the other provisions of Section 1021 excludes American citizens:

- Subsection (a) grants the President the authority to detain "covered persons'" without any exclusion for American citizens.

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authoritarianism_on_ capitol_hill/.

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

- Subsection (b) defines a "covered person" without reference to citizenship — simply by behavior — and therefore, American citizens are not excluded from the detention authority of the President.

- Subsection (c) applies to "a person," and American citizens are not excluded from its application.

- Subsection (d) contains no exclusion for American citizens.

Therefore, if there is to be found some exclusion for American citizens somewhere in Section 1021, it must be found in subsection (e). Focusing only on American citizens, subsection (e) reads:

> "Nothing in this section shall be construed to **affect existing law or authorities** relating to the detention of United States citizens...." [Emphasis added.]

Subsection (e) may have been intended to be capable of at least two or more very different readings than the ones given by either the Government or the court of appeals.

First, the court of appeals believes that the final phrase of subsection (e) — "who are captured or arrested in the United States" — applies only to "other persons" and not to "United States citizens" or "lawful resident aliens of the United States." 723 F.3d 192. If the court of appeals is incorrect on this point, Section

1021 would clearly apply to at least some American citizens — those "who are captured or arrested" outside "the United States."

Second, this subsection says that the powers contained in Section 1021(a) through (c) should be viewed not as a change in or clarification of any other law, as the court of appeals determined, but a free-standing source of Presidential authority. Congress instructed that Section 1021 is to be read independently from any "existing law or authorities."

If either of these two readings of subsection (e) were correct, the entire decision of the standing of American citizens of the court of appeals falls. Regardless of the particular view which seems most plausible, a matter of the seriousness of this statute cannot be allowed to hang on ambiguous legislative language of this sort — which likely was written precisely so that it could be subject to varying interpretations.[28]

What the court of appeals viewed as "curious if not contradictory" language in NDAA Section 1021 (734 F.3d at 189) is all that and more — vague, ambiguous, and unintelligible. This court must not allow such a statute to stand, ready to be construed this way or that as the executive branch may choose, to be used against American citizens.

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[28] Additionally, Judge Forrest ruled that a savings clause such as subsection (e) was "inadequate when it required an unrealistically broad reading of the clause," citing U.S. v. Stevens, 559 U.S. 460, 478 (2010).

III. THE COURT OF APPEALS DENIED PETITIONERS THE RIGHT TO CHALLENGE ANY ASPECT OF AUMF, EVEN THOUGH AUMF WAS EMBEDDED IN AND AFFIRMED BY NDAA.

The court of appeals admits that, while "previously 'existing law' may permit the detention of American citizens in some circumstances ... Section 1021 cannot itself be challenged as unconstitutional by citizens on the grounds advanced by plaintiffs because as to them it neither adds to nor subtracts from whatever authority would have existed in its absence." 724 F.3d at 193.

Although the court of appeals was never clear about the grounds of its ruling denying any consideration of AUMF, it apparently denied standing to the Hedges plaintiffs because their challenge was aimed only at NDAA Section 1021, not directly against AUMF, even though Section 1021 embedded and affirmed AUMF.

The court of appeals apparently failed to recognize that, once it moved away from its nullity theory and determined that Section 1021 actually clarified a matter in hot dispute, the Hedges plaintiffs would have standing, and the constitutional issue was properly before the court — requiring it to determine whether the government has the authority to use the military to "detain American citizens on American soil" based on NDAA Section 1021 alone.

However, if Section 1021 were viewed as a clarification of an ambiguous law — stating that, under

AUMF, individual American citizens may be detained — it grants to the government two staggering new powers over citizens never addressed by the court of appeals. First, Section 1021(c)(4) authorizes the government to "[t]ransfer to the custody or control of [i] the person's country of origin, [ii] any other foreign country, or [iii] any other foreign entity" any "covered person." This section would appear to allow transfer even of an American citizen born in the United States to any of the secret network of "black site prisons" run by the CIA in foreign countries, or into the hands of a foreign country that openly employs torture, or even into the hands of a non-state entity, such as the United Nations.[29]

Second, Section 1021 specifies that detention without trial is limited only by "the end of the hostilities [as provided in] the Authorization for the Use of Military Force" which, itself, contains no objective ending point. Rather, many persons of varying political stripes have speculated that the war on terror is a "state of perpetual war."[30] There is, thus, a very good

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[29] *See* "CIA's 'extraordinary rendition' of terror suspects challenged by 2 Gitmo detainees in EU human rights court," CBS News (Dec. 3, 2013). http://www.cbsnews.com/news/gitmo-prisoners-cia-extraordinary-rendition-eu-court/

[30] *See, e.g.,* Jeremy Scahill, "How Obama created endless war on terror," The Nation (Nov. 2, 2013) http://www.nation.com.pk/international/02-Nov-2013/how-obama-created-endless-war-on-terror; Col. Andrew Bacevich, "What do you call an endless war? The American Conservative (May 28, 2013) http://www.theamericanconservative.com/articles/what-do-you-call-an-endless-war/. *See also* G. Orwell, 1984 (1949) ("We've

reason for the Court to find standing here where "the war power is invoked to do things to the liberties of people ... the constitutional basis [of which] should be scrutinized with care." *See* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146-47 (1948) (Jackson, J., concurring).

To be sure, as the court of appeals said, the rules of standing were designed "to prevent the judicial process from being used to usurp the powers of the political branches" (citing Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138 (2013)). 724 F.3d 170 at 188. However, it would appear that the rules of standing as applied by the court of appeals are being used to immunize the political branches from review while they violate the basic rights of American citizens.

Therefore, the central question now before this Court is whether the federal judiciary will stand idly by while Congress and the President establish the legal framework for the establishment of a police state and the subjugation of the American citizenry through the threat of indefinite military arrest and detention, without the right to counsel, the right to confront one's accusers, or the right to trial.

Ninety years ago, Franz Kafka gave the world a glimpse into the terror faced by individuals required to prove their innocence against unspecified charges in a world devoid of the rule of law. *See* F. Kafka, The Trial (1925). No American citizen should be subject to secret

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always been at war with Eastasia.").

arrest and indefinite detention by the military, exempt from the protections of the Bill of Rights, and made even more terrifying by the threat of rendition to a foreign country for purposes that could include torture that is illegal in the United States.[31]

CONCLUSION

For the reasons set out above, the judgment of the U.S. Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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[31] Attempts to punish American citizens for support of an enemy of the United States through extra-judicial proceedings would violate the protections of the treason clause (Article III, Section 2) of the U.S. Constitution. *See* Amicus Curiae Brief of Virginia State Delegate Bob Marshall, *et al.*, Hedges v. Obama, 890 F. Supp 2d 424 (2012), Section III.