UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CHRISTOPHER HEDGES,

Plaintiffs,

Case No. 12-CV-331 (KBF)

-against-

BARACK OBAMA, individually, BARACK OBAMA, as a representative of the United States of America, LEON PANETTA, individually, and LEON PANETTA, in his capacity as the executive and representative of the Department of Defense,

Defendants.
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***AMICUS CURIAE* BRIEF OF VIRGINIA STATE DELEGATE BOB MARSHALL, VIRGINIA STATE SENATOR DICK BLACK, DOWNSIZE DC FOUNDATION, DOWNSIZEDC.ORG, INC., U.S. JUSTICE FOUNDATION, INSTITUTE ON THE CONSTITUTION, GUN OWNERS FOUNDATION, GUN OWNERS OF AMERICA, INC., THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, THE WESTERN CENTER FOR JOURNALISM, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, U.S. BORDER CONTROL, RESTORING LIBERTY ACTIONCOMMITTEE, TENTH AMENDMENT CENTER, CENTER FOR MEDIA AND DEMOCRACY, BILL OF RIGHTS DEFENSE COMMITTEE, PASTOR CHUCK BALDWIN, PROFESSOR JEROME AUMENTE, AND THE CONSTITUTION PARTY NATIONAL COMMITTEE IN SUPPORT OF PLAINTIFFS**

FRIEDMAN, HARFENIST, KRAUT & PERLSTEIN, LLP
3000 Marcus Avenue, Suite 2E1
Lake Success, New York 11042
(516) 355-9600

Of Counsel:
WILLIAM J. OLSON, PC
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180
703-356-5070

U.S. JUSTICE FOUNDATION
932 D Street, Suite 2
Ramona, California 92065
(760) 788-6624

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STATEMENT OF THE CASE

On September 18, 2001, just 7 days after 9/11, Congress — acting in the heat of passion against "acts of treacherous violence ... committed against the United States and its citizens" — enacted into law the **Authorization for Use of Military Force** ("AUMF"), Public Law 107-40. By this joint resolution, Congress authorized the President: (a) to identify the "nations, organizations, or persons" who "he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"; and (b) to determine the "necessary and appropriate force" to be used against those identified and any others who "harbored" them. Such authority was conferred upon the President "in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons." *See* 50 U.S.C. § 1541 note.

A decade later, on December 31, 2011, Congress enacted into law section 1021 of the **National Defense Authorization Act of 2012** ("NDAA"), affirming that the President's authority under AUMF "include[d] the authority for the Armed Forces of the United States to detain covered persons," as defined by section 1021(b), "pending disposition under the law of war." While the persons "covered" by NDAA included persons responsible for 9/11 (section 1021(b)(1)), the purpose of the Act was not primarily to affirm the means by which persons would be punished for past acts of terrorism. Rather, the main purpose was to provide for the preventive detention of persons who "**are engaged in hostilities** against the United States or its coalition partners" in the present and on into the future. *See* NDAA section 1021(b)(2) (emphasis added). To the latter end, Congress elected to align its definition of covered persons in section 1021(b)(2) with the Obama Administration's view of those persons who are subject to

"the law of war," including preventive detention, as had been submitted in a court brief on March 13, 2009.[1]

In his statement explaining his decision to sign NDAA into law, President Obama emphasized that section 1021 "breaks no new ground and is unnecessary," accomplishing "nothing more than [to] confirm authorities that the Federal courts have recognized as lawful under the 2001 AUMF."[2] Further, the President explained that sections 1021(d) and (e) were deliberately designed to "codif[y] established authorities." *Id.* And he maintained that those authorities, in turn, "best preserve[] the flexibility on which our safety depends and uphold[] the values on which this country was founded." *Id.* This is precisely the position taken by counsel for defendants (Government counsel) at the hearing on plaintiffs' motion for a preliminary

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[1] In its March brief, the Obama Administration asserted:

> The President ... has the authority to detain persons who were part of, or **substantially supported**, Taliban or al-Qaeda forces or **associated forces** that **are engaged in hostilities** against the United States or its coalition partners, including any person who has committed a **belligerent act**, or has **directly supported hostilities**, in the aid of enemy forces. [Respondents' Memorandum Regarding the Government's Detention Authority, U.S. District Court, District of Columbia, Misc. No. 08-442 (TFH) (Mar. 13, 2009) (emphasis added) (hereinafter "Government Memorandum on Detention Authority") http://www.justice.gov/opa/documents/ memo-re-det-auth.pdf/.]

NDAA section 1021(b)(2) tracks this language closely:

> A person who was a part of or **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 the aid of enemy forces. [Emphasis added.]

See also Congressional Research Service, Jennifer K. Elsea, Michael John Garcia, "The National Defense Authorization Act for FY 2012: Detainee Matters," pp. 6-7 (Jan. 11, 2012) ("CRS Detainee Report"). http://www.fas.org/sgp/crs/natsec/R42143.pdf.

[2] Statement by President Obama on H.R. 1540 (Dec. 31, 2011) (hereinafter "Signing Statement). http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540.

injunction. *See* Hedges v. Obama, Transcript of PI Hearing, pp. 214, l. 19 - 215, l. 2. (U.S.D.C. S.D.N.Y., 12 Civ.331) (Mar. 30, 2012) (hereinafter "Tr.").[3]

In sum, NDAA section 1021(b)(2)'s definition of those persons who may be "detain[ed] ... pending disposition under the law of war" is one that has been fashioned by the President, not by Congress, and is designed to be **construed and applied** by "counterterrorism professionals with the clarity and flexibility they need to **adapt to changing circumstances** and to utilize whichever authorities best protect the American people...." Signing Statement (emphasis added). Even viewed in this light most favorable to the Government, section 1021(b)(2) is unconstitutional on its face. Argument I demonstrates that section 1021(b)(2) is fatally vague in violation of the notice principle embodied in the Fifth Amendment due process guarantee, and fatally overbroad in violation of the First Amendment guarantee of the freedom of speech. Argument II shows that section 1021(b) is unconstitutional on its face because its authority is completely dependent on AUMF which, in turn, is based upon an unconstitutional delegation of the power to declare war to the President. Argument III shows with respect to plaintiff U.S. citizens that section 1021 on its face violates Article III, Section 3, Clause 1 of the U.S. Constitution. Argument IV demonstrates section 1021 is not a light or transient matter.

[3] Of course, nothing President Obama or his Department of Justice says about how this vague statute would be interpreted and applied tells us anything about any future president, and President Obama has only nine more months in his current term of office.

ARGUMENT

I. ON ITS FACE, SECTION 1021(b)(2) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. Section 1021(b)(2) is Designedly Indeterminate.

At the March 30, 2012 hearing, Government counsel was asked by the Court to clarify two key terms — "**substantially support**"[4] and "**associated forces**"[5]– appearing in section 1021(b)(2). At each opportunity, Government counsel declined. When asked for "an example" of "substantial support," Government counsel replied: "I'm not in a position to give specific examples."[6] When asked for one example of a statutory "boundary" around "associated forces," Government counsel responded with an example of an "armed group" that a court had "found to be an associated force."[7] In response, the Court asked: "[A]re we to have to wait until courts ... decide on a fact scenario who the associated forces are? Is that the only way we can figure this out?"[8] To which question Government counsel had already given the answer: "it will be ... on a case-by-case determination of what precisely may be permissible" on consideration of "habeas applications being made by detainees."[9]

This is not the first time that Government lawyers have taken this position. In its January 11, 2012 report to Congress, Congressional Research Service attorneys reported that:

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4 Tr., pp. 224, l. 14 - 225, l. 1.
5 Tr., pp. 227, l.24 - 228, l. 1.
6 Tr., p. 226, ll. 10-16.
7 Tr., p. 228, ll. 2-10.
8 Tr., p. 229, ll. 8-10.
9 Tr., p. 227, ll. 7-11.

> In its 2009 brief, the government **declined to clarify** these aspects of its detention authority: "It is **neither possible nor advisable**, however, to attempt to identify, in the abstract, the precise nature and degree of '**substantial support**,' or the precise characteristics of '**associated forces**,' that are or would be sufficient to bring persons and organizations within the foregoing framework." [CRS Detainee Report, p. 7 (emphasis added).]

Instead, it is Government policy that:

> Section 1021 does **not** attempt to **clarify** the circumstances in which a U.S. citizen ... captured within the United States may be held as an enemy belligerent in the conflict with Al Qaeda. Consequently, if the executive branch decides to hold such a person under the detention authority affirmed in Section 1021, it is **left to the courts to decide** whether Congress meant to authorize such detention when it enacted the AUMF in 2001. [*Id.* at 16 (emphasis added).]

After a survey of the relevant cases, the CRS report concludes that, "regardless of their citizenship, the **circumstances** in which persons captured in the United States may be subject to preventive military detention **have not been definitively adjudicated**." *Id.* (emphasis added).

Because of the lack of definitive judicial resolution as to whether U.S. citizens could be preventively detained under AUMF, attempts were made in Congress to adopt an amendment to NDAA that "would have expressly barred U.S. citizens from long-term military detention on account of enemy belligerent status...." *Id.* at 15. The amendment was considered and rejected. *Id.* Thus, the CRS report concludes that the legality and constitutionality of the preventive detention of U.S. citizens, even those captured on American soil, is left unsettled by section 1021. *Id.* at 10. Actually, the definitional standard by which a court is to make the decision whether a person is subject to preventive detention under NDAA section 1021 is not only unsettled, it is **deliberately "indeterminate."** For example, the CRS report states that "the

inclusion of 'associated forces'" in the definition of covered persons is "a category of **indeterminate breadth**," as is the "'substantial support' prong of the executive's description of its detention authority...." CRS Report, p. 7 (emphasis added).

The definition of covered persons subject to preventive detention was deliberately left unsettled and fluid, in order to maximize presidential discretion. Indeed, since 9/11, Congress has given the President *carte blanche* power to determine how and against whom he would take the nation to war. That very process — policy by presidential initiative and congressional acquiescence — does not yield the rule of law. Rather, it bows down to executive prerogative. Instead of Congress setting the rules to govern the President's actions, Congress delegates the rule making power to the President and, then, acquiesces to those rules.

That is exactly what happened in the formulation of NDAA section 1021(b)(2). As pointed out, *supra*, the definition of "covered person" in section 1021(b)(2) appeared initially in a U.S. Department of Justice brief filed in the case known as In re Guantanamo Bay Detainee Litigation. CRS Detainee Report, p. 7, n.18. Instead of exercising its independent judgment to fashion a rule to govern the exercise of presidential discretion, Congress has simply conformed section 1021(b)(2) to accommodate executive experience and practice. This is not the process by which law is to be made under the United States Constitution. Paraphrasing Justice Hugo Black's keen observation in Youngstown Sheet & Tube v. Sawyer: section 1021(b)(2) does not direct that a congressional policy be executed in a manner prescribed by Congress — it directs that a presidential policy be executed in a manner prescribed by the President. *See id.,* 343 U.S. 579, 588 (1952).

B. Section 1021(b)(2) is Unconstitutionally Vague.

A legislature has a constitutional duty to "define the conduct it chooses to make criminal" in order to preserve "**the rule of law**."[10] Otherwise, courts will be left with little guidance to assess whether a particular person is entitled to constitutional and legal criminal procedural protections, or whether he is subject to indefinite detention or trial by military commission. A vague statute gives excessive discretion to the President permitting discriminatory treatment, resulting in a breakdown of the rule of law. *See* Gans Facial Challenges at 1359-61.[11] The liberty interest of the individual is even more paramount in times of war, for at stake is whether the person may be held indefinitely without trial (or trial by military commission), or whether that person entitled to the procedural safeguards of the Bill of Rights.

1. The Definition of "Covered Person" in Section 1021(b)(2) is Vague.

NDAA section 1021(b)(2)'s definition of "**covered person**" is permeated with vagueness. First, section 1021 contains absolutely **no *mens rea* requirement**.[12] A person may be found to have "substantially supported" al-Qaeda or the Taliban without any intent, knowledge, recklessness, or even negligence, or to have given such support to "associated forces" without any intent, knowledge, recklessness or negligence as to whether those forces were "engaged in hostilities"

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[10] *See* David H. Gans, "Strategic Facial Challenges," 85 BOSTON UNIV. L. REV. 1333, 1371 (2005), http://128.197.26.36/law/central/jd/organizations/journals/bulr/volume85n5/Gans.pdf (hereinafter "Gans Facial Challenges").

[11] President Obama's plea for "flexibility" to protect the safety of the American people in the nation's war against international terrorism is no different from similar efforts in the 1970's and 1980's for "law enforcement tools to combat the epidemic of crime that plague[d] our Nation." *See* Kolender v. Lawson, 461 U.S. 352, 361 (1983). As was true with regard to the **war on crime**, so the **war on terrorism** "cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *See id.*

with the United States or its partners. A person could also be found to have "committed a belligerent act ... in aid of ... enemy forces" without any proof of intent, knowledge, or breach of any standard of care. Finally, a person could be found to have "directly supported ... hostilities" against the United States or its partners "in aid of ... enemy forces" without having any idea that such an act was being committed.

Having dispensed with any *mens rea* requirement whatsoever, section 1021(b)(2) fails "to provide the kind of **notice** that will enable ordinary people to understand what conduct it prohibits [and] may authorize and even encourage arbitrary and discriminatory enforcement." *See* City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (emphasis added). Indeed, it appears from the legislative history that the section 1021(b)(2) definition of "covered person" was left **deliberately indeterminate** in order to maximize presidential discretion, at the price of abandoning the rule of law.

2. The Reach of Section 1021(b)(2) is Vague. While President Obama has attempted to reassure American citizens in his December 2011 signing statement, such assurance, like section 1021(b)(2), is vague. The President has stated that he "want[ed] to **clarify** that [his] administration will not authorize the indefinite military detention without trial of American citizens," but when asked by this Court to clarify whether "without trial" meant a military or civilian trial, Government counsel stated that he "would have to look at the signing statement again."[13] Later, Government counsel asserted emphatically that, if a person is an American citizen, "the President's signing statement would make his fear of indefinite detention

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[12] Nor is there any *mens rea* requirement in the AUMF text. It makes an "unwitting" appearance, if at all, only in "case law." *See* Tr., pp. 230, l. 30 - 232, l. 10.

under this provision unreasonable."[14] But a presidential signing statement is not binding law on President Obama's successor in office; indeed, the statement does not even estop the president who wrote it.

Some claim that NDAA section 1022(b)(1) exempts U.S. Citizens from detention, but that exemption is only from mandatory detention, not detention at the discretion of the president.[15] Additionally, some claim that NDAA section 1021(e) exempts U.S. citizens from preventive detention:

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

And, as detailed above, the "executive's existing authority to detain U.S. Citizens" is left to the courts to decide case by case. CRS Detainee Report, p. 16.

C. Section 1021(b)(2) is Unconstitutionally Overbroad.

NDAA section 1021(b)(2)'s unconstitutional vagueness also imposes a "**chilling effect**" upon the exercise of the First Amendment freedoms of speech, press, and assembly. As the Supreme Court stated in Keyishian v. Board of Regents, 385 U.S. 589 (1967), "'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms'...

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[13] Tr., p. 237, ll. 16-25.

[14] Tr., p. 244, ll. 8-10.

[15] Section 1022(b)(1) reads: "The **requirement** to detain a person in military custody **under this section** does not extend to citizens of the United States." (Emphasis added.) As the plain language of this provision states, American citizens are **exempt** only from the military detention **required** under section 1022(a); such citizens are **not** exempted from the preventive detention **permitted** by section 1021(a). As the CRS report has stated, NDAA "**authorizes** the detention of certain categories of persons and **requires** the **military detention** of a **subset** of them...." *Id.* at 1 (emphasis added). Thus, if a U.S. citizen is found to be a

'for standards of permissible statutory vagueness are strict in the area of free expression...'" *Id.* at 603.

There is no doubt that the plain language of section 1021(b)(2) could reach journalists, Internet bloggers, political activists, and others engaged in First Amendment activities. Any publication of views contrary to the official government policy concerning the war on terror could be construed as "substantially supporting" not only al-Qaeda and the Taliban, but also "associated forces." And certainly membership in an "associated force" could well be construed to constitute "substantial support" of al-Qaeda or the Taliban.

Under questioning by the Court at the March 30 hearing whether section 1021(b)(2)'s "associated forces" would reach political advocacy activities, Government counsel replied "that for ten years this authority has been in existence and the government has never taken the position that any kind of independent advocacy or expression [like that engaged in by Plaintiff Hedges] could put someone within that authority"[16] and "that 'associated forces' cannot extend to groups that are not armed at all."[17] Remarkably, in making these and like statements, Government counsel did not base them upon any construction or interpretation of the language of section 1021(b)(2). Rather, counsel relied solely upon the claim that the Government has chosen not to extend its preventive detention so far, noting that during that entire time the Government had the "same authority" as it does now under section 1021 and the plaintiffs "have been engaging in the

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"covered person" as defined by section 1022(a)(2), **requiring** detention, the citizen is still subject to **permissible** preventive detention under section 1021(a).

[16] Tr., p. 237, ll. 7-10.

[17] Tr., p. 236, ll. 17-18.

same activities that they claim fear and nothing has happened to them."[18] But, as the Supreme Court recently ruled, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." United States v. Stevens, 559 U.S., 130 S.Ct. 1577, 1591 (2010). As Chief Justice Roberts observed: "The Government's assurance that it will apply [a statutory provision] more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Id.*

The U.S. Supreme Court ruled long ago that making it unlawful to join, or otherwise to support, an organization "without knowledge of [its] unlawful purposes *and* specific intent to further its unlawful aims" would "run afoul of the Constitution." Keyishian, 385 U.S. at 606-07. As noted above, section 1021(b)(2)'s definition of covered person contains no *mens rea* requirement whatsoever, much less the "specific intent" requirement commanded by the First Amendment. Thus, section 1021 is **overly broad**, violating the rights of American citizens to the freedoms of speech, of the press, and of association. *See* Elfbrandt v. Russell, 384 U.S. 11 (1966).

II. SECTION 1021 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT IS ROOTED IN AUMF, AN UNCONSTITUTIONAL DELEGATION OF CONGRESSIONAL POWER.

In his signing statement, President Obama stated:

> Section 1021 affirms the executive branch's authority to detain persons covered by the 2001 [AUMF].... This section breaks no new ground and is unnecessary.

Indeed, section 1021 presupposes that "the law of war" is applicable to American citizens in an ongoing offensive war against international terrorism, having been invoked by Congress with the

[18] Tr., p. 242, ll.17-21.

passage of AUMF. This further assumes that AUMF is the product of a constitutional exercise of Congressional power, delegating to the President the power to define and identify the enemy and to determine the means by which that enemy will be deterred from future attacks. These assumptions of constitutionality are false.

In the preamble to AUMF, Congress asserted that "the President has authority under the Constitution to take action to **deter and prevent** acts of international terrorism against the United States." (Emphasis added.) This broad statement is untrue. It has long been recognized that a President's unilateral authority to employ military force is constitutionally limited "**to repel** sudden attacks." *See* L. Tribe, American Constitutional Law §4-7, p. 232 (2d ed. 1987) (emphasis added). Accordingly, as Professor Tribe has observed, the Supreme Court in the Prize Cases "recognized an inherent executive power, exercised derivatively through the Commander in Chief clause, **to repel** an invasion or rebellion without first seeking legislative approval."[19] *Id.* (emphasis added).

President Obama's reading of AUMF, however, assumes that a President also has the unilateral constitutional authority "to deter and prevent acts of international terrorism," rendering it "unnecessary" for Congress to make the rules governing the President's use of military force in the nation's ongoing war against international terrorism. But it is Congress, not the President, that has the enumerated power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." *See* Article I, Section 8, Clause 10, U.S. Constitution.

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[19] *See* 67 U.S. (2 Black) 635 (1863).

Moreover, Article I, Section 8, Clause 11 of the United States Constitution vests Congress with the power "to declare war." That power includes the prerogative to determine whether the nation is **legally entitled** to take the nation into war and whether it is **prudent** to do so. *See* J. Tuomala, "Just Cause: The Thread that Runs So True," 13 *Dick. J. of Int'l Law* 1, 41-47 (1994). In order to make the legal judgment to go to war, the nation or other body against which war is being declared must be identified specifically. The legal judgment that is required cannot be exercised generally, as in the AUMF. Likewise, the prudential judgment of counting the cost[20] cannot be performed generally, but must be specific lest the nation discover later that it did not have the resources necessary to defeat the enemy. Both of these twin decisions are to be made by Congress, not by the President, and cannot be delegated. *Id.* at 45. Only after Congress has made both the legal and the prudential decisions to go to war may the President as Commander-in-Chief prosecute the war effort, including designating certain individuals to be enemy combatants, subject to the jurisdiction of military commissions, not civilian courts.

AUMF, however, authorizes **the President** "to use all necessary and appropriate force against those ... **he determines**" were responsible for 9/11. (Emphasis added.) Accordingly, by the terms of AUMF, it was the President, not Congress, who in effect "declared war" against the Taliban in Afghanistan. And, because AUMF also delegates to the President the power to use armed force "in order to prevent future acts of international terrorism against the United States," it is the President, not Congress, who has the power to take any war — including the war against terrorism — to any other nation, organization, or person. AUMF, then, is unconstitutional because it purports to delegate to the President the authority to make both the legal and the

[20] *See, e.g.*, Luke 14: 31-32.

prudential decisions to invoke the nation's war power. After unconstitutionally imposing a state of war upon the nation, the Government may not claim AUMF as the "authority" for section 1021.

Nor can the Government rely on Hamdi v. Rumsfeld, 542 U.S. 507 (2004), to support its contention that NDAA section 1021 is constitutionally legitimate. To be sure, Hamdi ruled that an American citizen was not constitutionally entitled to the procedural protections of the Bill of Rights as they apply to a criminal prosecution if the citizen was an "enemy combatant." But the Hamdi court stated that it would only decide the "narrow question" before it; namely, whether an American citizen "carrying a weapon against American troops on a foreign battlefield" was an "enemy combatant." *Id.* at 522, n.1. The constitutionality of AUMF was not addressed by the Court. Additionally, the Court left the question entirely open whether a citizen arrested on American soil could be detained without trial until the end of hostilities, or whether the Government was obliged by the Constitution to comply with the Bill of Rights guarantees extended to criminal defendants.

As the Congressional Research Service has documented, since Hamdi, **it has not yet been definitely adjudicated** whether an American citizen captured in the United States can be treated as an "enemy combatant." CRS Detainee Report, p. 16, n.67. Although the U.S. Court of Appeals for the Fourth Circuit has extended the Hamdi ruling to two such citizens, the Government tactically declined to avoid obtaining a definite ruling on that issue when it chose to "transfer[] [the detainee] to civilian law enforcement custody for criminal prosecution before the Supreme Court could consider the merits of the case." *Id.*

III. WITH RESPECT TO THE AMERICAN CITIZEN PLAINTIFFS, SECTION 1021 VIOLATES THE ARTICLE III TREASON CLAUSE AND IS UNCONSTITUTIONAL ON ITS FACE.

Although NDAA section 1021(b)'s definition of "covered person" may not discriminate between enemy combatants who are United States citizens and other such combatants who are not such citizens, the Treason Clause in the United States Constitution does:

> **Treason** against the United States, shall consist **only** in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted. [Article III, Section 3, Clauses 1 and 2 (emphasis added).]

In *Federalist No. 43,* James Madison explained that the Treason Clause was one of the **enumerated powers** of the federal government.[21] By defining treason in the Constitution and placing it in Article III, the founders intended the power to be checked by the judiciary, ruling out trial by military commission. As Madison noted, the Treason Clause also was designed to **limit the power** of the federal government to punish its citizens for "adhering to [the United States's] enemies, giving them aid and comfort." In such cases, Madison warned:

> **[N]ew-fangled and artificial treasons** have been the great engines by which violent **factions**, the natural offspring of free government, have usually wreaked their alternate **malignity** on each other. [*Id.* (emphasis added).]

Therefore, Madison concluded, the Constitutional Convention:

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[21] "As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it...." [*The Federalist*, p. 224 (G. Carey & J. McClellan, eds., Liberty Fund, Indianapolis: 2001).]

> with great judgment, opposed a barrier to this peculiar danger, by inserting a **constitutional definition of the crime**, fixing the proof necessary for conviction of it, and restraining the congress, even in punishing it, from extending the consequences of guilt beyond the person of its author. [*Id.* (emphasis added).]

The Government appears to believe that Congress and the President may ignore these constitutional strictures and, in reliance on the "war power," treat an **American citizen** who is **allegedly** "substantially support[ing] al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States," as an **enemy combatant**, with complete discretion **not to charge** that person with the crime of **treason** to **circumvent** the substantive and procedural **protections** of Article III, Section 3.

According to the Treason Clause, an American citizen may not be punished for "levying war" or "adhering" to the nation's enemies under any statute other than one complying strictly with the Constitutional definition of treason.[22] As Joseph Story observed, there is very good reason that treason's "true 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 very subordinate nature are often, by popular prejudices ... magnified into this ruinous importance. [2 J. Story,

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[22] Hamdi should not be read to the contrary. As Justice O'Connor emphasized, Hamdi, although an American citizen, was "captured in a foreign combat zone," not arrested on American soil. *Id.* 542 U.S. at 523. Section 1021(b)(2) sweeps more broadly, reaching citizens and their actions on American soil. As Professor Tribe has noted, "in *Ex parte Milligan* the Court held that martial law during the Civil War could not 'be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed,'" L. Tribe, American Constitutional Law at § 4-7, p. 238. *See also* Hamdi, 542 U.S. at 554-63 (Scalia, J., dissenting). As Justices Scalia and Stevens observed in their Hamdi dissent, "[w]here the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime." *Id.* at 554.

> Commentaries on the Constitution, § 1797, p. 577 (5th ed., Little, Brown: 1891) (emphasis added).]

The true nature of NDAA section 1021's definition of "covered person" as one who "substantially supports" or "commits a belligerent act" is precisely the kind of "indeterminate" definition that is prohibited by the Treason Clause. As Story also observed, any departure from the constitutional definition "alone is sufficient to make any government **degenerate into arbitrary power**." *Id.*

IV. THE THREAT TO THE AMERICAN CONSTITUTIONAL REPUBLIC IS SERIOUS AND LASTING.

It is generally assumed that the "law of war" is temporary, and that the powers conferred by AUMF and NDAA section 1021 will cease when the war effort against those responsible for the attacks against the nation on 9/11. But AUMF authorizes the President not only to "use all necessary and appropriate force against those nations, organizations, or persons he determines" were responsible for 9/11, but also "to **prevent** any future acts of international terrorism." (Emphasis added.) So the end of hostilities will not occur until the war on international terrorism comes to an end. Thus, the "law of war" invoked by AUMF, and continued under NDAA section 1021, will continue so long as the President determines that the threat of future acts of terrorism, whatever their source, continues.

The Supreme Court has ruled that, "the war power does not necessarily end with the cessation of hostilities." Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948). In that light, the Court warned that, because "the effects of war under modern conditions may be felt in the economy for years and years," the war power "may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well." *Id.* at 143-44. Rather

than assume the end of hostilities, and thus the cessation of the law of war, it would be wise to heed these words of wisdom penned by Robert Jackson, a former attorney general, then sitting as an associate justice of the U.S. Supreme Court:

> [T]he arguments that have been addressed to us lead me to utter more explicit misgivings about war powers than the Court has done. The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable "war power." No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It is usually invoked in haste and excitement, when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. [*Id.*, at 146 (Jackson, J., concurring).]

While Justice Jackson recognized that even the judiciary could be caught up in the emotions of war, it is incumbent on the third branch of government to exercise its independent judgment.[23]

[23] As Alexander Hamilton wrote in *Federalist No. 78*: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." *The Federalist*, p. 404.

CONCLUSION

Amici curiae urge the Court to exercise its solemn duty and rule that NDAA section 1021 is unconstitutional on its face.

Dated: Lake Success, New York
April 16, 2012

Respectfully submitted,

/s/

Steven J. Harfenist (SJH 6930)
FRIEDMAN HARFENIST KRAUT & PERLSTEIN LLP
3000 Marcus Avenue, Suite 2E1
Lake Success, New York 11042
(516) 355-9600
sharfenist@fhkplaw.com

OF COUNSEL:
Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
Robert J. Olson
WILLIAM J. OLSON, PC
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180
703-356-5070
wjo@mindspring.com

Gary G. Kreep
U.S. JUSTICE FOUNDATION
932 D Street, Suite 2
Ramona, California 92065
(760) 788-6624
usjf@usjf.net

STATE OF NEW YORK)
)ss.:
COUNTY OF NASSAU)

KATHRYN BARANELLO, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age, and resides in Floral Park, New York. On April 16, 2012, deponent served the within: **NOTICE OF MOTION and DECLARATION OF STEVE J. HARFENIST, with Proposed Brief**, upon the following person(s) herein by depositing true copies of same enclosed in properly addressed, post-paid wrapper(s), by regular mail in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York :

TO: Bruce Ira Afran, Esq.
10 Braeburn Drive
Princeton, New Jersey 08540

Carl J. Mayer, Esq.
66 Witherspoon Street, Suite 414
Princeton, New Jersey 08542

Benjamin H. Torrace, Esq.
Christopher Blake Harwood, Esq.
U.S. Attorney's Office, SDNY
86 Chambers Street
New York, New York 100017

KATHRYN BARANELLO

Sworn to before me this
16th day of April, 2012

NOTARY PUBLIC

LISA MARIE MILLER
Notary Public, State of New York
No. 01MI6101001
Qualified in Queens County
Commission Expires November 3, 2015

/D/FKB/D132512/FL2180